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IN THE

Supreme Court of the United States

BETHLEHEM STEEL CORPORATION; GENERAL PENSION BOARD OF THE BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; and MICHAEL P. DOPERA, Secretary, Employee Benefits Administration Committee,

Petitioners,

v.

ROBERT J. HARTE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where a pension plan provision regarding a break in service could be deemed to be ambiguous, does the plan administrator have a fiduciary duty enforceable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), to notify all potentially affected employees of the administrator's interpretation of that provision prior to any action by the employee that could break his/her service?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
PERTINENT STATUTES	2
STATEMENT OF THE CASE	3
1. Statutory and Precedential Background	5
2. Factual and Procedural Background	7
REASONS FOR GRANTING THE PETITION	12
I. The Third Circuit's Holding that Plan Administrators Have a Fiduciary Duty to Notify All Affected Participants Whenever They Interpret an Ambiguous Plan Provision Regarding Severance Departs from this Court's Ruling in *Firestone* that Plan Administrators Have Full Discretion to Interpret Ambiguous Provisions and Conflicts with Other Circuits that Do Not Impose Such a Fiduciary Duty	12
II. The Third Circuit's New Cause of Action against Plan Administrators Is Unworkable and Violates this Court's Standards in *Varity* for Limiting Breach of Fiduciary Duty Claims	19
CONCLUSION	23
APPENDIX A, *Harte v. Bethlehem Steel Corp.*, No. 98-2052 (3d Cir. July 19, 2000), order denying sur petition for panel rehearing with suggestion of rehearing en banc	1a

TABLE OF CONTENTS—Continued

Page

APPENDIX B, *Harte v. Bethlehem Steel Corp.*, No. 98-2052 (3d Cir. May 26, 2000), judgment reversing decision of district court and remanding for further proceedings 3a

APPENDIX C, *Harte v. Bethlehem Steel Corp.*, No. 98-2052 (3d Cir. May 26, 2000), opinion reversing decision of district court and remanding for further proceedings 5a

APPENDIX D, *Harte v. Bethlehem Steel Corp.*, No. 98-2052 (3d Cir. July 19, 2000), order amending May 16, 2000 opinion with stylistic changes 24a

APPENDIX E, *Harte v. Bethlehem Steel Corp.*, No. 98-2052 (3d Cir. Feb. 29, 2000), opinion reversing decision of district court and remanding for further proceedings 26a

APPENDIX F, *Harte v. Bethlehem Steel Corp.*, No. 98-2052 (3d Cir. March 21, 2000), order granting petition for panel rehearing 42a

APPENDIX G, *Harte v. Bethlehem Steel Corp.*, No. 97-cv-6528 (E.D. Pa. Oct. 22, 1999), memorandum opinion granting summary judgment in favor of defendants 43a

TABLE OF AUTHORITIES

CASES — Page

Alessi v. Raybestos-Manhattan, Inc., 453 U.S. 504 (1981) 23
Bins v. Exxon Corp. U.S.A., 220 F.3d 1042 (9th Cir. 2000) (en banc) 5, 17, 18
Bixler v. Central Pa. Teamsters Health-Welfare Fund, 12 F.3d 1292 (3d Cir. 1993) 16
Childers v. Northwest Airlines, Inc., 688 F. Supp. 1357 (D. Minn. 1988) 12
Cummings v. Briggs & Stratton Retirement Plan, 797 F.2d 383 (7th Cir. 1986) 17
Curcio v. John Hancock Mutual Life Ins. Co., 33 F.3d 226 (3d Cir. 1994) 15
De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989) 5, 14, 15
Eddy v. Colonial Life Ins. Co., 919 F.2d 747 (D.C. Cir. 1990)) 17, 18
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 5, 6, 13, 14
Harte v. Bethlehem Steel Corp. et al., 214 F.3d 446 (3d Cir. 2000) ..... *passim*
In re Unisys Corp., 57 F.3d 1255 (3d Cir. 1995) ... 15
Jordan v. Federal Express Corp., 116 F.3d 1005 (3d Cir. 1997) 16
Keating v. Whitmore, 186 F.3d 418 (3d. Cir. 1999) 14
Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 6, 19, 20
Maxa v. John Alden Life Ins. Co., 972 F.2d 980 (8th Cir. 1992) 5, 16, 22
Mertens v. Hewitt Associates, 508 U.S. 248 (1993) 19
Millensifer v. Retirement Plan for Salaried Employees of Cotter Corp., 968 F.2d 1005 (10th Cir. 1992) 14

TABLE OF AUTHORITIES—Continued

Page

Morton v. Smith, 91 F.3d 867 (7th Cir. 1996)..... 14
Pulvers v. First Unum Life Ins. Co., 210 F.3d 89 (2d Cir. 1999)..... 14
Stahl v. Tony's Bldg. Materials, Inc., 875 F.2d 1404 (9th Cir. 1989)..... 17
Varity Corp. v. Howe, 516 U.S. 489 (1995).....5, 6, 19, 20, 21

STATUTES

28 U.S.C. § 1254(1)..... 2
28 U.S.C. § 1331..... 2
Employment Retirement Income Security Act of 1974, 88 Stat. 832, as amended, 29 U.S.C. § 1000, *et seq.* (1999 ed.)..... 2
Employment Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1999 ed.)..... 2, 3
Employment Retirement Income Security Act of 1974, § 502(a), 88 Stat. 891, 29 U.S.C. § 1132(a) (1999 ed.)..... 2
Employment Retirement Income Security Act of 1974, § 502(a)(1)(B), 88 Stat. 891, 29 U.S.C. § 1132(a)(1)(B) (1999 ed.)..... *passim*
Employment Retirement Income Security Act of 1974, § 502(a)(2), 88 Stat. 891, 29 U.S.C. § 1132(a)(2) (1999 ed.)..... 2, 6
Employment Retirement Income Security Act of 1974, § 502(a)(3), 88 Stat. 891, 29 U.S.C. § 1132(a)(3) (1999 ed.)..... *passim*

OTHER

Restatement (Second) of Trusts § 173, comment d (1959)..... 18

PETITION FOR A WRIT OF CERTIORARI

Petitioners Bethlehem Steel Corporation ("Bethlehem"), the General Pension Board of the Bethlehem Steel Corporation and Subsidiary Companies, and Michael P. Dopera (the "Plan Administrator"), Secretary of the Employee Benefits Administration Committee of Bethlehem (collectively, "Petitioners"), respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit reversing a decision by the United States District Court for the Eastern District of Pennsylvania that had granted summary judgment to Petitioners.[1]

OPINIONS BELOW

The order of the Court of Appeals denying Petitioners' petition for rehearing en banc is unreported and is reprinted at Appendix A. The judgment of the Court of Appeals is reprinted at Appendix B. The final opinion of the Court of Appeals issued after granting reconsideration is reported at 214 F.3d 446 (3d Cir. 2000) and is reprinted at Appendix C. An order dated July 19, 2000, amending the Court of Appeals' opinion (stylistic changes only) is reprinted at Appendix D. An unreported opinion of the Court of Appeals was vacated by the panel upon motion for reconsideration by Petitioners, *see* 204 F.3d 453 (3d Cir. 2000), and is reprinted at Appendix E. The Court of Appeals' ruling granting Petitioners' Request for Rehearing of the court's original opinion is reprinted at Appendix F. The opinion of the District Court is unreported and is reprinted at Appendix G.

JURISDICTION

The Court of Appeals entered its judgment on May 26, 2000. It denied Petitioners' timely petition for rehearing en

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[1] Pursuant to Rule 29.1, Petitioners certify that they have no undisclosed parent companies and that no publicly held companies hold 10% or more of any of their stock or otherwise are financially interested in the outcome of the proceeding.

banc on July 19, 2000. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Federal jurisdiction in the District Court was asserted pursuant to 28 U.S.C. § 1331.

PERTINENT STATUTES

Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 832, as amended, 29 U.S.C. § 1001 *et seq.* (1999 ed.), provides the following civil remedies for individuals seeking to enforce its terms:

> Sec. 502. (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section [providing for liquidated damages for failure to provide certain information on request], or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under Section 409 [entitled "Liability for Breach of Fiduciary Duty"];
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain such equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan[.]

ERISA § 502(a), 88 Stat. 891, 29 U.S.C. § 1132(a) (1999 ed.).

The alleged violation of ERISA in this case arises under ERISA § 404(a)(1), which provides that plan administrators owe the following fiduciary duties to participants and beneficiaries:

> Sec. 404. (a)(1) Subject to sections 1103(c) and (d), 1342, and 1343 of this title, a fiduciary shall discharge

his duties with respect to a plan solely in the interest of the participants and beneficiaries—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1999 ed.).

STATEMENT OF THE CASE

In its decision below, the Third Circuit crafted a new rule for pension plan administrators and a new cause of action for plan beneficiaries under ERISA. Whenever a plan administrator "does not inform a beneficiary that his employment is severed when he might predictably and reasonably presume, after reading the pertinent part of the plan, that he is still employed, [the administrator] may be held liable for a breach of fiduciary duty." *Harte v. Bethlehem Steel Corp. et al.*, 214 F.3d at 453, App. C at 17a. The court set forth four elements for this new cause of action: (1) a material pension plan provision regarding severance (2) that is susceptible of multiple and predictably reasonable alternate interpretations (3) which the plaintiff relied upon to his detriment (4) without timely notice by the plan administrator of his interpretation. *See id.*, App. C at 7a, 214 F.3d at 448.

In practical terms, the Third Circuit's ruling will require plan administrators to determine when each employee of the company might be nearing a break in service and then notify the employee before any break in service occurs that the plan administrator has interpreted an arguably ambiguous plan

provision. For employees such as Respondent Harte who are out on extended disability leave, the plan administrator will bear all responsibility for monitoring their employment status and contacting them to warn of an impending service break, at least under the administrator's interpretation of the plan. The administrator's failure to do so would subject the plan to significant damages, even though the employee would have had a duty in the first place to return to work if able to do so. Petitioners respectfully assert that this inversion of rights and duties substantially alters the careful balance set forth by Congress in ERISA.

Indeed, the Third Circuit seemingly understood the draconian impact of its logic, as the court revised its holding to try to narrow its scope to apply to service break issues only. *Compare* App. C at 7a, 17a-18a, 214 F.3d at 448, 453-54 *to* App. E at 28a-29a. The court offered no legal justification for its narrower holding, however, and its distinction appears to be arbitrary and expedient, not in any way consonant with the careful demarcation of duties set forth by Congress in ERISA.

Petitioners respectfully submit that this holding conflicts with prevailing Supreme Court precedent and decisions of several Circuits; improperly expands the narrow cause of action for breaches of fiduciary duty set forth in ERISA § 502(a)(3); and imposes an unworkable burden on plan administrators to ferret out any plan terms regarding service breaks that might possibly be deemed ambiguous, and then to identify and notify all employees who potentially might be affected by the plan provision *in advance* of any action or inaction by the employee that would effect a break in service under the plan. This new standard of fiduciary duty is so broad that, simply put, it is impossible to implement.

The Third Circuit's ruling conflicts with precedents of this Court and the other Circuits in two respects.

First, the decision departs from this Court's holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), that where, as here, a trustee has been "given [the] power to construe disputed or doubtful terms" of a plan, "the trustee's interpretation will not be disturbed if reasonable." As applied by the other Circuits, this principle allows plan administrators to reasonably interpret those provisions without requiring notice to affected plan participants of all such interpretations. *See, e.g., De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989); *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 985 (8th Cir. 1992). The Third Circuit's opinion thus conflicts with the well-settled rule applicable in other Circuits that "in the absence of a promise to update an employee, an ERISA fiduciary's duty does not extend beyond giving complete and accurate answers to the employee's questions." *Bins v. Exxon Corp. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000) (en banc).

Second, the Third Circuit's decision departs from the clear rule laid down in *Varity Corp. v. Howe*, 516 U.S. 489 (1995), that claims for breach of fiduciary duty under § 502(a)(3) of ERISA cannot be used to bypass the statutory limits governing claims for benefits under § 502(a)(1)(B). The Third Circuit's opinion demonstrates the problem. Although the court acknowledged that the Plan Administrator properly exercised his discretion under the plan and lawfully denied Respondent Harte benefits under the plan, so that Harte had no benefit claim under § 502(a)(1)(B) of ERISA, the court held that Harte might nevertheless be able to recover benefits for the same claim under the breach of fiduciary duty provisions of § 502(a)(3)—without ever showing an abuse of discretion. That conflation of remedies violates this Court's decision in *Varity*.

1. Statutory and Precedential Background.

ERISA protects employee pensions and other benefits by, *inter alia*, providing insurance for vested pension rights;

regulating certain plan features and setting forth general fiduciary duties applicable to the management of pension and nonpension plans. *See Varity*, 516 U.S. at 496. In implementing these safeguards, ERISA provides individual participants and beneficiaries with two statutory remedies that are pertinent here: (i) actions under § 502(a)(1)(B) to challenge denials of claims for benefits; and (ii) actions under § 502(a)(3) for breaches of fiduciary duty.[2] This Court reviewed these provisions in two leading cases, *Firestone* and *Varity*.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the Court held that when a pension plan gives a plan administrator discretionary authority to interpret ambiguous plan terms, judicial review of that determination is deferential and limited to reviewing the plan administrator's decision for abuse of discretion. As the Court explained, the plan administrator "may be given power to construe disputed or doubtful terms, and in such circumstances, [his] interpretation will not be disturbed if reasonable."

In *Varity*, 516 U.S. at 512-15, the Court affirmed the availability of an individual cause of action for breach of fiduciary duty under ERISA § 502(a)(3) where no other adequate remedy exists under § 502(a). In so doing, the Court expressly cautioned that this "catchall" remedy acted as a "safety net" to offer "appropriate equitable relief for injuries caused by violations that § 502 does not adequately remedy," *id.* at 512, and that where adequate relief was otherwise provided by Congress, relief under § 502(a)(3) "normally would not be 'appropriate,'" *id.* at 515. This cautionary limitation was made to address the concerns of *amici* who had

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[2] A third remedy for breaches of fiduciary duty under § 502(a)(2) is limited to remedies that benefit the entire plan, rather than an individual participant or beneficiary. *See Varity*, 516 U.S. at 509; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-44 (1973).

warned of the dangers of dressing up benefit claims as claims for breaches of fiduciary duty. *See id.* at 514.

2. Factual and Procedural Background.

Harte's claim for additional pension benefits arises under the Bethlehem 1985 Salaried Pension Plan ("the Plan") (JA 294, 333),[3] which gives the Plan Administrator authority to interpret the Plan's terms and to determine the years of continuous service to be credited to any Plan participant. Both the District Court and the Court of Appeals affirmed that the Plan vests the Plan Administrator with discretion to interpret disputed or unclear terms of the Plan. *See* App. C at 8a n.2, 214 F.3d at 449 n.2; App. G at 50a. A participant's entitlement to any benefit under the Plan is governed in large part by his years of "continuous service" with Bethlehem, as that term is defined in the Plan. (JA 98-104, Plan § 5). The Plan provides that continuous service is "broken" by an "absence which continues for more than two years." (JA 99).

The Plan provision in question concerns an exception to the service break rule. Under ¶ 5.1(b)(4) of the Plan, service is deemed to continue without break if the employee leaves work due to a "compensable disability incurred during course of employment." (JA 99, ¶ 5.1(b)(4)). The Plan Administrator and his predecessors have consistently interpreted and administered the provision to refer to work-related disabilities compensable under state worker's compensation programs, not to non-work related disabilities that merely happen to occur while the participant was employed by Bethlehem. (JA 425). By contrast, Harte asserted that this provision allowed him to continue to accrue service under the Plan after he had stopped working at Bethlehem and been absent from work for more than two years simply because he was receiving disability benefits for a cardiac disability that had commenced

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[3] References to "JA" refer to the Joint Appendix filed by the parties in the Court of Appeals proceedings.

while he was working at Bethlehem but which was unrelated to his employment. Harte in effect equated his no-work related disability with a "compensable disability incurred during the course of his employment."

Harte had two previous tours of employment at Bethlehem as an electrical engineer prior to returning to Bethlehem for a third time on February 15, 1973.[4] From February 15, 1973, he worked as a salaried Bethlehem employee until his last day of work on January 27, 1986, when he took extended disability leave for a non-work related cardiac condition. (JA 333-34, 356). From January 28 through May 6, 1986, Harte received a Disability Absence Allowance benefit paid by Bethlehem to employees who are absent from work due to short-term disability or sickness. After this allowance expired on May 6, Harte received two weeks vacation pay through May 20, 1986. (JA 376). Thereafter, Harte received long-term disability benefits from May 21, 1986 until he turned 65 on April 23, 1999 (JA 336, 370-71), when he became eligible for his Deferred Vested Pension benefit under the 1985 Plan. (JA 370-71, 420).

Contrary to the speculation by the Court of Appeals that Harte could have returned to work during this period had he known that he might lose pension benefits due to a break in service, Harte has consistently averred in sworn insurance claim forms that he was totally disabled and unable to work.[5]

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[4] Prior to raising the issue here regarding the exception to the continuous service break rule, Harte had filed several administrative appeals seeking to have his previous service time count as "continuous" service at Bethlehem even though these were clearly interrupted when Harte left Bethlehem to pursue other employment as an electrical engineer. The Plan Administrator, the District Court and the Court of appeals denied those claims, and they are not at issue in this Petition.

[5] Harte executed a claim for long-term disability benefits on April 28, 1986 stating that he did not expect to return to his job or any other occupation, that his doctor "recommend[ed] medical disability," and that

Indeed, had he been able to work, he was obligated to do so and halt his disability benefits.

Harte's disability eventually triggered a service break. He stopped working on January 27, 1986, and the two-year anniversary of his absence fell on January 27, 1988. The Plan Administrator therefore determined that his continuous service broke on that date (JA 293), leaving him nineteen days shy of fifteen years of continuous service from February 15, 1973, when he had commenced working at Bethlehem. Had he reached fifteen years of continuous service, he might have been eligible for a Permanent Incapacity pension. (JA 34, ¶ 2.5).

Harte contended that his service did not break because he was receiving disability benefits due to a cardiac condition that had commenced while he was working at Bethlehem. He claimed a variety of pension benefits as a result. The Plan Administrator denied the claims, as Harte's cardiac condition admittedly was not work-related and could not have been compensated by worker's compensation. (JA 425).

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that his disability did not entitle him to worker's compensation benefits. (JA 387-88). He certified under oath that he first became "totally disabled by sickness or injury," such that he was "wholly unable to work," on January 20, 1986. (JA389). The application further stated that, as of April 21, 1986, Harte was "now wholly unable to engage in any and all work, and any and every occupation of business" and that his disability was not "due to sickness or injury arising out of any employment for wage or profit." (JA 388-89). In 1995, Harte expressly referred to himself "[a]s a disabled individual unable to perform gainful employment this past ten years." (JA 409).

Also in April 1986, Harte filed a claim for continuance of his life insurance during his total disability, stating that his disability was caused by "[i]ncreased angina from prior anterolateral myocardial infarction," for which he was first treated in June of 1979, which his treating physician confirmed. (JA 335-36, 389-92). On three separate occasions, his treating physicians filed statements certifying that Harte was permanently disabled and that his disability was not due to any injury or sickness arising out of his employment. (JA 336, 393-98).

Following an unsuccessful administrative appeal, Harte filed this lawsuit on October 21, 1997 in the United States District Court for the Eastern District of Pennsylvania. He did not assert a claim for breach of fiduciary duty under ERISA § 502(a)(3), but instead claimed wrongful denial of benefits under § 502(a)(1)(B) and wrongful interference by Bethlehem with his pension rights. (JA 16). The District Court (Cahn, C.J.) granted Petitioners summary judgment on both claims, ruling that, *inter alia*, the Plan Administrator had no obligation – fiduciary or otherwise – to notify Harte in advance of his break in service. (App. G at 54a-56a).

On appeal, the Third Circuit reversed and remanded for further proceedings. The court agreed with Petitioners that the Plan Administrator had authority under the Plan to interpret all ambiguities in the Plan, including the service break provisions, and that his interpretation of the service break exception was reasonable. (App. E at 29a). Nevertheless, the court concluded that because Harte might reasonably have interpreted the Plan differently than the Plan Administrator and relied on that contrary interpretation to his detriment, a factfinder could reasonably conclude that the Plan Administrator had a fiduciary duty to advise Harte *in advance*, before his service broke, of the administrator's interpretation of the provision. In other words, the court held that the Plan Administrator could be found to have had a fiduciary duty (i) to determine that ¶ 5.1(b)(4) could be deemed to be ambiguous, (ii) to monitor Harte's status while out from work on disability, and (iii) to advise Harte that, under the administrator's interpretation of ¶ 5.1(b)(4), Harte's service would be broken if he remained on disability. This notice was necessary so that Harte could take steps "to protect himself." (App. E at 41a).[6]

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[6] The Court of Appeals apparently thought advance notice might be possible because the Plan Administrator typically notified Bethlehem employees of their service breaks and entitlement to pension benefits

The court speculated that even though Harte's cardiac condition prevented long-term employment (*see* n.4, *supra*), Harte still might have been able to work briefly for a few weeks in a sedentary capacity to complete his fifteen years of continuous service. (App. E at 40a). This speculation by the appellate court is at direct odds with Harte's sworn representations in his disability insurance application forms averring that he was totally disabled and unable to work. It also suggests that the Plan Administrator and employer had some obligation to bend the rules or "game" the system in order to allow Mr. Harte to accrue service to which he was not otherwise entitled. This suggestion is directly contrary to a fundamental precept of ERISA—that plan provisions are to be administered uniformly for the benefit of all participants.

Petitioners moved for reconsideration, and the panel vacated its decision. Eventually, the Court of Appeals panel issued a new decision making one significant change in its opinion. (App. C). In response to Petitioners' contention that it had imposed an impossible burden on plan administrators, requiring them first to ferret out all plan ambiguities and then to identify and notify all participants who potentially might be affected by the administrator's interpretation in advance of any action or inquiry by the participants, the Court of Appeals narrowed the scope of its holding to service break issues only:

> [W]hen a material plan provision regarding severance is interpreted in a manner such that beneficiaries might predictably and reasonably rely on an alternate inter-

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approximately one year *after* the break had occurred if, as in the case of Mr. Harte, the employee had accrued sufficient service to be entitled to a deferred vested pension as opposed to an immediate pension under the Plan. *See* App. C at 20a, 214 F.3d at 454. (In Harte's case, the notice was substantially delayed due to an inconsequential clerical error.) This notice cannot be sent *before* the service break because the break is the triggering event for the Plan Administrator to assess the participant's status. The administrator has no ready means of monitoring the employment status and future retirement plans of thousands of employees.

> pretation, a fiduciary may be held liable for failing to inform a beneficiary that his service has been broken in a timely manner, i.e., at or near the time his service was broken (so that he might attempt to protect himself.

(App. C at 7a). The court did not explain why a fiduciary duty to disclose all potentially adverse interpretations would be limited to interpretation of severance provisions and would not extend to interpretation of all ambiguous plan provisions subject to the plan administrator's discretion. It did agree with Petitioners that such a requirement could "give rise to a 'practically impossible burden of anticipating, and comprehensively addressing, the individualized concerns of thousands of employees.'" App. C at 19a-20a, 214 F.3d at 454 (quoting *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357, 1362 (D. Minn. 1988)).

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Holding that Plan Administrators Have a Fiduciary Duty to Notify All Affected Participants Whenever They Interpret an Ambiguous Plan Provision Regarding Severance Departs from this Court's Ruling in *Firestone* that Plan Administrators Have Full Discretion to Interpret Ambiguous Provisions and Conflicts with Other Circuits that Do Not Impose Such a Fiduciary Duty.

In imposing a fiduciary duty on the Plan Administrator to (i) determine all ambiguities in the Plan regarding breaks in service; (ii) identify all employees who could be affected by the Plan Administrator's interpretation of an ambiguity; and (iii) timely inform those employees in advance of any action on their part that could result in their service breaking when they might reasonably believe that they would still be employed, the Third Circuit significantly departed from this Court's holding in *Firestone*. Moreover, although the court tried to limit its opinion to service break issues, it ruled that

plan administrators have "a duty of completeness" to clarify all ambiguities in a plan that a beneficiary might reasonably find "confusing or incomplete" and thus "potentially misleading." (App. C at 16a, 214 F.3d at 453). Thus, the Third Circuit's reasoning would logically extend to all ambiguities in the plan.

The Third Circuit's decision conflicts with this Court's repeated statements that courts should defer to the reasonable exercise of discretion by plan administrators. In *Firestone*, the Court applied ordinary trust principles to hold that if a trustee has been "given [the] power to construe *disputed or doubtful terms*" of the plan, "the trustee's interpretation *will not be disturbed* if reasonable." *Firestone*, 489 U.S. at 115 (emphasis added). The Court nowhere stated that ambiguities would be resolved against the plan administrator unless clarified by advance notice to all potentially affected participants.

By holding that plan administrators have a fiduciary obligation to clarify in advance how they will construe ambiguous plan provisions regarding severance (or any other issue, per its initial holding), the Third Circuit essentially disallowed such ambiguities altogether—a clarified ambiguity is no longer an ambiguity. Thus, plan administrators will face a task more difficult than squaring a circle—they must identify, in the abstract, all potential circumstances in which an ambiguity could arise and resolve the ambiguity in advance of any specific question that might frame the issue for the administrator. In other words, plan administrators must issue advisory opinions as to all issues where an employee might reasonably act to his detriment. This ruling conflicts directly with *Firestone*, where the Court made clear that a plan administrator's reasonable exercise of discretion could not be second-guessed by the courts.[7]

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[7] The Circuits have consistently affirmed that courts should defer to the administrator's discretion in selecting among competing interpretations of

The Third Circuit's ruling will swallow the *Firestone* discretionary principle. With the benefit of hindsight, a beneficiary may always claim that he/she relied on some purported plan ambiguity to justify some decision or election—whether and when to retire; whether to purchase certain insurance; whether to pursue alternate employment, etc. Thus, if the Third Circuit's rule is correct, decisions applying *Firestone* to uphold discretionary decisions by plan administrators to deny or limit benefits due to breaks in service were wrongly decided.

For instance, in *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989), the Fourth Circuit addressed similar facts: plaintiffs elected to retire early based on their interpretation of a plan provision contrary to the plan administrator's interpretation, which left them with "substantially less" benefits. *See id.* at 1183. Even though the court acknowledged that the beneficiaries' interpretation might be more reasonable and "subjectively compelling" than the administrator's view, the Fourth Circuit held that that fact was "of no moment," as the administrator's denial of benefits was not arbitrary and could not be overturned. *Id.* at 1190. Under the Third Circuit's reasoning, the administrator's failure to notify the *De Nobel* plaintiffs of his interpretation

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an arguably ambiguous plan provision. *See Keating v. Whitmore*, 186 F.3d 418, 422 (3d Cir. 1999) (administrator has "power to resolve in his own discretion" an "ambiguous" plan provision); *Pulvers v. First Unum Life Ins. Co.*, 210 F.3d 89, 93-94 (2d Cir. 1999) (administrator's "flawed" and "strained" interpretation was not arbitrary and capricious); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989) ("because there is . . . nothing more than a dispute over the . . . trustees' 'interpretations' of unclear language found in the plan documents themselves, we are compelled under [*Firestone*]'s express mandate to apply the deferential 'abuse of discretion' standard"); *Millensifer v. Retirement Plan for Salaried Employees of Cotter Corp.*, 968 F.2d 1005, 1009 (10th Cir. 1992) (same); *Morton v. Smith*, 91 F.3d 867, 871-72 (7th Cir. 1996) (same rule applies even if plaintiff's view is the more reasonable one).

prior to their retirement would have created a cause of action for breach of fiduciary duty—a result directly contrary to the Fourth Circuit's ruling in favor of the defendants. The Third Circuit's decision here cannot be reconciled with *De Nobel*.

The new duty created by the Third Circuit to notify affected beneficiaries that they will be deemed severed under the administrator's interpretation of a plan ambiguity was in no way required by this Court's precedents.

Until this decision, no Court of Appeals has held that an ambiguous plan provision could itself constitute a misrepresentation or omission triggering a fiduciary duty of full disclosure. To the contrary, even the Third Circuit had previously required an actual misrepresentation by the *plan administrator* or a failure to disclose information when he "knows" that his "failure to do so might cause harm." *In re Unisys Corp.*, 57 F.3d 1255, 1264-65 (3d Cir. 1995) (affirming lower court finding that "virtually the entire company management had consistently misrepresented the plan"). The failure to clarify an ambiguity in a plan cannot be equated with a misrepresentation by the plan administrator.

Indeed, the Third Circuit's ruling would subsume the longstanding ERISA principle of equitable estoppel. Under that doctrine, participants can recover for detrimental reliance on affirmative *misstatements* by a plan administrator. *See Curcio v. John Hancock Mutual Life Ins. Co.*, 33 F.3d 226, 235-36 (3d Cir. 1994). By allowing recovery by participants simply on the basis of an unresolved ambiguity, the Third Circuit has eliminated two of the three elements of equitable estoppel: an actual misrepresentation by the administrator and extraordinary circumstances. *See id.* (plaintiff "must show" that administrator "made material misrepresentations").[8] The decision creates a new rule of estoppel by silence.

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[8] Indeed, in the Third Circuit's prior cases cited in the decision below, the breach of fiduciary duty claim involved some form of individualized

The Circuits had hitherto rejected any unilateral duty upon plan administrators to provide individualized notice to affected beneficiaries of potentially adverse actions. Even in the Third Circuit, the decisions had only imposed "an affirmative duty to inform when the trustee *knows* that silence might be harmful." *Bixler v. Central Pa. Teamsters Health-Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (emphasis added). In *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 985 (8th Cir. 1992), for instance, a beneficiary's estate argued that the beneficiary had detrimentally relied on a summary plan description in failing to apply for Medicare benefits. The Eighth Circuit agreed that, while the summary was "not crystal-clear" and did "not unambiguously state" the terms for applying for the benefits, *id.* at 984-85, ERISA imposed no affirmative obligation to provide individualized notice:

> The great majority of courts, however, have not imposed upon an ERISA plan fiduciary the duty individually to notify participants and/or beneficiaries of the specific impact of the general terms of the plan upon them.
>
> * * *
>
> [O]n the facts of this case, the arguable ambiguity of the coordination of benefits provision at issue does not require a reviewing court, in order to achieve a fair result, to visit from hindsight upon the administrator and/or the fiduciary the requirement of individual notice.

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inquiry by or communication to the participant or an express duty to disclose set forth in the plan. *See, e.g., Bixler v. Central Pa. Teamsters Health-Welfare Fund*, 12 F.3d 1292, 1300-02 (3d Cir. 1993) (focusing on the fact that employees had alleged that they had made specific *inquiries* to plan administrators who then failed to disclose all pertinent information, resulting in a mistaken belief of ineligibility and detrimental inaction); *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1016 (3d Cir. 1997) ("Under the terms of the plans, the administrator was obligated to provide all participants" with a written explanation of their rights prior to an election).

Id. at 985-86 (quoting *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409-10 (9th Cir. 1989) (emphasis in original)). *See also Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 387 (7th Cir. 1986) (same)).[9]

The Ninth Circuit just recently reiterated this principle in an en banc decision holding that plan administrators do not have fiduciary duties to disclose serious consideration of material changes in a plan even after a participant had previously inquired and was told that no changes were contemplated. *Bins v. Exxon Corp. U.S.A.*, 220 F.3d 1042, 1054 (9th Cir. 2000) (en banc). In reversing a panel decision to the contrary, the full Ninth Circuit held that administrators had such a duty to disclose only if they had already promised that they would make such a disclosure. *Id.* The court specifically found that imposing such a requirement on administrators "would extend an ERISA plan administrator's fiduciary duty *beyond conveying truthful information* and any discretionary duties it has assumed, and *thus would be inconsistent with Varity*. No other court has so extended a fiduciary's duty to disclose." *Id.* (emphasis added). To the contrary, while some courts have stated that "'[a] fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the [fiduciary] relationship,'" *id.* (quoting *Eddy v. Colonial Life*

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[9] The Court of Appeals' attempt to distinguish *Maxa* on its facts (*see* App. C at 18a-19a, 214 F.3d at 454) misses the mark. The panel asserts that *Maxa* did not expressly link its finding of an ambiguity to its holding of no duty to warn, and that the *Maxa* plaintiff did not demonstrate reliance. *Id.* This is incorrect. The plaintiff in *Maxa did* allege detrimental reliance upon "an arguably ambiguous plan provision." *See* 972 F.2d at 984-86. Nevertheless, the Eighth Circuit held, based on several precedents in other jurisdictions, that ERISA imposed no affirmative obligation to provide "individualized notice" to affected beneficiaries notwithstanding "the arguable ambiguity" of the provision at issue. *Id.* at 985-86.

Ins. Co., 919 F.2d 747, 750 (D.C. Cir. 1990)), such dicta applies only to cases where the administrator had actual knowledge of prejudice to the participant, *i.e.*, "'when the fiduciary has knowledge of prejudicial acts by an employer – such as the failure of an employer to contribute to a fund as requested,' *id.*, or 'when an ineligible person contributes to a fund[.]'" *Id.* (quoting *Eddy*, 919 F.2d at 751). *See also Bins*, 220 F.3d at 1053 n.10 (citing cases and circumstances where actual knowledge of prejudice triggered duty to disclose). Otherwise, the administrator has no fiduciary obligation to volunteer information in the absence of an inquiry. *See Eddy*, 919 F.2d at 750-51 (continuing duty to provide correct information arises "once a beneficiary has made known his predicament").[10]

The Third Circuit's holding that plan administrators must affirmatively determine whether affected participants might reasonably interpret plan provisions in a contrary manner is in direct conflict with the standard applied by the other Circuits requiring actual knowledge of detrimental reliance by the participant. This Court should therefore review this matter to resolve the conflict and determine whether the Third Circuit departed from *Firestone* and its progeny.

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[10] Common law trust principles do not require any more from fiduciaries. *See* Restatement (Second) of Trusts § 173, comment d (1959) ("[the trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection").

II. The Third Circuit's New Cause of Action against Plan Participants Is Unworkable and Violates this Court's Standards in *Varity* for Limiting Breach of Fiduciary Duty Claims.

The Third Circuit's decision is also directly at odds with this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1995), providing individuals with only limited remedies for a breach of fiduciary duty under § 502(a)(3) of ERISA. In *Varity*, the Court cautioned that § 502(a)(3) is not to be used as a substitute for a benefit claim under § 502(a)(1)(B). *See* 516 U.S. at 512 (acknowledging that § 502(a)(1)(B) "provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims . . . , one that runs directly to the beneficiary," citing *Firestone*).

By contrast, the § 502(a)(3) "catchall" remedy offers only "appropriate equitable relief for injuries that § 502 does not elsewhere adequately remedy." *Id. See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993) (courts should not infer causes of action under ERISA). Thus, because Harte had an adequate remedy under § 502(a)(1)(B)—indeed, it constituted the only claim ever asserted by Harte against the Plan Administrator—and did not prevail, *Varity* prevents him from recasting the same breach of fiduciary duty claim under § 502(a)(3). This situation was addressed in *Varity*, where the Court contrasted *Massachusetts Mut. Life v. Russell* on this basis:

> Further, *Russell* involved a complicating factor not present here, in that another remedial provision (subsection (1)) already provided specific relief for the sort of injury the plaintiff had suffered (wrongful denial of benefits) but said "nothing about the recovery of extracontractual damages, or about the possible

> consequences of delay in the plan administrators' processing of a disputed claim."

516 U.S. at 510 (quoting *Russell*, 473 U.S. at 144).

The Third Circuit's decision also runs afoul of the prudential concerns addressed by the Court in *Varity*. As the Court discussed at considerable length, the *amiçi* in *Varity* anticipated the potential mischief that might arise from a fiduciary duty cause of action in the context of a benefits dispute, as in this case. They argued that the fiduciary duty cause of action recognized in *Varity* would conflict with the *Firestone* deferential standard of review for benefit determinations where the plan administrator has discretionary authority:

> But what will happen, ask *amici*, if a beneficiary can repackage his or her "denial of benefits" claim as a claim for "breach of fiduciary duty?" Wouldn't a court, they ask, then have to forgo deference and hold the administrator to the "rigid level of conduct" expected of fiduciaries? And, as a consequence, would there not then be two "incompatible legal standards for courts hearing benefit claim disputes" depending upon whether the beneficiary claimed simply "denial of benefits," or a virtually identical "breach of fiduciary duty?"

Varity, 516 U.S. at 513-14.

This is the same scenario that the Third Circuit's decision has created here. At bottom, Harte's dispute is over his entitlement to pension benefits under the Plan, a fact confirmed by the fact that his complaint alleged a claim against the Plan Administrator only under § 502(a)(1)(B). Nevertheless, while the Third Circuit recognized the Plan Administrator's discretionary authority to determine Harte's years of continuous service and eligibility for benefits (App. C at 8a n.2) and affirmed the District Court's grant of summary judgment in favor of the Plan on the benefits claim (*id.*), it allowed Harte to proceed under § 502(a)(3) to recover

the same pension benefits to which he is not entitled under § 502(a)(1)(B). This is the very inconsistency posited by the *amici* in *Varity*.

The Court made clear in *Varity* that there should be no such inconsistency. In addressing the concerns of *amici*, the Court made two pertinent responses. *First*, the Court explained that the standard of judicial review should be the same: "Characterizing a denial of benefits as a breach of fiduciary duty does not necessarily change the standard a court would apply when reviewing the administrator's decision to deny benefits." *Varity*, 517 U.S. at 514. Yet in holding that plan administrators have a fiduciary duty to anticipate all instances in which plan provisions could be deemed ambiguous, the Third Circuit has sharply curtailed the administrator's broad discretion under § 502(a)(1)(B). *Second*, the Court noted that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" *Id.* at 515. Accordingly, breach of fiduciary duty principles may not be used to bypass § 502(a)(1)(B) and permit benefits that otherwise are not owed under the plan.

The *Varity* principles are apt, as the Court's decision will have a serious impact on plan administrators. Even as limited in scope by the Third Circuit upon rehearing to service break issues, the new rule requires fiduciaries to exercise 20-20 clairvoyance and anticipate all instances in which a plan provision regarding service breaks might reasonably be read differently by a participant that it is by the plan administrator. Moreover, under the decision's logic, administrators must predict whether a judicial trier of fact would discern an ambiguity—at risk of liability for breach of fiduciary duty if they are wrong. For instance, in this case, the administrator would have to anticipate that even though the phrase "compensable disability incurred during course of

employment" is a term of art referring to a work-related injury subject to worker's compensation, some participants (particularly those with the benefit of hindsight in litigation) might read the terms differently. In any event, even if the administrators are able to deconstruct the plan with perfect acuity, they must then identify all beneficiaries who might be affected and take steps to notify them.

Compliance with this new standard is not feasible. Indeed, after vacating its initial broad holding (App. F), the Third Circuit panel recognized that "[a] broad fiduciary duty to inform beneficiaries about the effects of all plan provisions upon them" would be "'practically impossible'" to implement. (App. C at 19a). But the panel's solution—requiring that the employer notify participants only when they might be severed from service (*id.* at 7a)—does not fix the inherent problem of requiring administrators to determine which plan provisions might be viewed as ambiguous. Moreover, the Third Circut's logic applies to *all* ambiguous plan provisions, not just severance provisions. If the Third Circuit's interpretation of § 502(a)(3) is correct, then its holding cannot be arbitrarily limited to severance provisions only and instead must apply to all matters of plan interpretation, as the court had originally held.

Other courts have recognized the futility of compelling the impossible: "[F]iduciaries should be able to rely upon the detailed and uniform guidance ERISA provides with regard to disclosure requirements rather than bearing the practically impossible burden of anticipating, and comprehensively addressing the *individualized* concerns of thousands of employees, especially without notice of those concerns." *Maxa*, 972 F.2d at 986 (emphasis in original). Indeed, the very fact that the Third Circuit felt obliged to try to narrow the scope of its holding is telling. Its decision imposes an impossible standard on plan administrators and upsets the careful "reticulated" balance of interests and burdens in

ERISA crafted by Congress. *Alessi v. Raybestos-Manhattan, Inc.*, 453 U.S. 504, 510 (1981).

In sum, it is inconsistent to recognize a breach of fiduciary duty claim under § 502(a)(3) to recover benefits that the participant is not entitled to receive under § 502(a)(1)(B). The Third Circuit's ruling to that effect is contrary to *Varity*'s limited exception for individual relief under § 502(a)(3) and should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to resolve the conflict among the Circuits and the important issues presented in this Petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-2052
(D.C. Civ. No. 97-cv-06528)

ROBERT J. HARTE,

Appellant

v.

BETHLEHEM STEEL CORPORATION; GENERAL PENSION BOARD OF THE BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; MICHAEL P. DOPERA, Secretary, Employee Benefits Administration Committee

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Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY AMBRO, FUENTES, and NOONAN,* *Circuit Judges*.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellees having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

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* As to panel rehearing only.

BY THE COURT:

/s/ Illegible
Chief Judge

DATED: 19 JUL 2000

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-2052

ROBERT J. HARTE,

Appellant

v.

BETHLEHEM STEEL CORPORATION; GENERAL PENSION BOARD OF THE BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; MICHAEL P. DOPERA, Secretary, Employee Benefits Administration Committee

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On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-06528)
District Judge: Honorable Edward N. Cahn

Present: BECKER, *Chief Judge*, McKEE and NOONAN,* *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on September 28, 1999 and after the grant of panel rehearing submitted pursuant to Third Circuit LAR 34.1(a) on April 17, 2000.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 26, 1998, be, and the same is hereby

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*Honorable John Noonan, United States Circuit Judge for the Ninth Circuit, sitting by designation.

vacated as to the claim for a breach of fiduciary duty for failure to notify and the cause is remanded to the District Court for further proceedings. The judgment is affirmed in all other respects. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Acting Clerk

Dated: 26 May 2000

Certified as a true copy and issued in lieu of a formal mandate on July 27, 2000

TESTE:

/s/ Marcia M. Waldron
Acting Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

[Filed May 26, 2000]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-2052

ROBERT J. HARTE,

Appellant

v.

BETHLEHEM STEEL CORPORATION; GENERAL PENSION BOARD OF THE BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; MICHAEL P. DOPERA, Secretary, Employee Benefits Administration Committee

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On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-06528)
District Judge: Honorable Edward N. Cahn

Argued: September 28, 1999

Before: BECKER, *Chief Judge,* McKEE, and NOONAN [*] *Circuit Judges*

(Opinion Filed February 29, 2000)
Panel Rehearing Granted March 21, 2000
Submitted Under Third Circuit LAR 34.1(a)
April 17, 2000

(Opinion Filed May 26 2000)

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[*] Honorable John Noonan, United States Circuit Judge for the Ninth Circuit, sitting by designation.

OPINION OF THE COURT

BECKER, *Chief Judge*.

This appeal, arising out of a claim for pension benefits under ERISA, is set in the familiar factual pattern of an employee's being denied a more advantageous pension because of a minor shortfall in the required period of service. Robert J. Harte had accrued credit for fourteen years, eleven months, and eleven days at Bethlehem Steel when the benefits plan administrator terminated his continuous service (for pension purposes) because Harte had been absent from work for two years. When Harte's service was terminated, he was nineteen days short of eligibility for the "70/80" pension he now seeks. Harte claims that he did not learn that his service had been "broken," and hence that he had not accrued the fifteen years required for the pension, until approximately eight years later. After finally being notified of his shortfall, Harte sued, raising a host of arguments why Bethlehem Steel was required to give him the 70/80 pension, including arguments as to why his continuous service should never have been severed. The District Court granted summary judgment for Bethlehem Steel. Harte's strongest claim is a breach of fiduciary duty claim. He argues that (1) the plan document was unclear about when a break in service would be effected; (2) he reasonably believed that he was still employed under the terms of the plan; and therefore (3) Bethlehem Steel, as an ERISA fiduciary, should have notified him when it broke his service.

The Bethlehem Steel plan provides that an employee may receive a 70/80 pension after fifteen years of "continuous service." It states that although continuous service is broken two years after leaving work for a disability, it is not broken if the reason for leaving is a "compensable disability incurred during course of employment." Bethlehem Steel represents that the plan administrator, within his authority, has

consistently interpreted this phrase to apply only to work-related disabilities that are compensated by state worker's compensation, which Harte did not receive. However, Harte applied for, received, and continued to receive (up to the date of suit), compensation for his disability through the company's long term disability program. On this ground, he contends that his service should never have been broken because he has a "compensable disability incurred during course of employment." Even if there are multiple plausible readings, he submits, the most natural reading of the term "compensable disability incurred during course of employment" encompasses disabilities compensated by long term disability benefits (which do not require a showing that the disability was work-related).

We agree with Bethlehem Steel that the plan administrator had the authority to make the interpretation that he did and to effect the severance. However, our precedent leads us to conclude that a fact-finder could decide that the company also had a fiduciary duty to timely inform Harte of its interpretation. We have consistently held that a plaintiff may obtain relief under § 502(a)(3) of ERISA if he or she demonstrates detrimental reliance on inconsistent or confusing statements by a fiduciary. It follows that when a material plan provision regarding severance is interpreted in a manner such that beneficiaries might predictably and reasonably rely on an alternate interpretation, a fiduciary may be held liable for failing to inform a beneficiary that his service has been broken in a timely manner, i.e., at or near the time his service was broken (so that he might attempt to protect himself). We believe that this standard has been met in this case. Someone receiving benefits under the company's long term disability program might predictably, and reasonably, expect to be covered under the umbrella of those who are not severed, thinking they have a "compensable disability incurred during the course of employment."

Since all the requisites are met, we vacate the grant of summary judgment and remand the case for further proceedings on the breach of fiduciary duty claim.[1] The District Court properly granted summary judgment for Bethlehem on all other issues, and we affirm summarily with respect to these claims.[2]

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[1] Bethlehem argues that Harte should not be allowed to proceed on this claim because it was inadequately pled. Harte did not cite § 502(a)(3) in his complaint, nor did he seek to amend the complaint. His complaint does, however, allege the lack of notification, and his papers refer to several cases that revolve around § 502(a)(3) claims. Moreover, the District Court discussed this claim in the context of one of those cases, *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) (a breach of fiduciary duty case that we discuss more fully infra Section II). We are satisfied that, given our broad notice pleading standards, Harte's breach of fiduciary duty claim has been adequately pled.

[2] Harte contends that, given the ambiguity of the plan provisions, Bethlehem could not interpret the plan in a fashion that inured to its own benefit. However, Paragraphs 5.3(a) and 8.1 of the Bethlehem plan grant the administrator the discretion to interpret the "continuous service" provision. Under the aegis of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114-15 (1989), when the plan administrator has this kind of discretion, we generally apply the arbitrary and capricious standard of review in the absence of evidence that bias influenced the decision, even where the employing company is both the plan sponsor and plan administrator. *See Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 n.5 (3d Cir. 1993). Applying that standard, Bethlehem's plan administrator did not abuse his discretion. The documents available to him did not indicate that Harte's disability was work-based, and it was within the plan administrator's discretion to conclude that those on worker's compensation should be credited for continuous service for the time that they were on worker's compensation, while those who left for non-work related disabilities should not be so credited. The issue decided in the text is, of course, a different one.

Harte also argues that the District Court erred in holding that Bethlehem's 1985 pension plan applied to his case; in misunderstanding the import of *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523

I.

As far as is pertinent to this appeal, Harte worked at Bethlehem in several capacities between 1973 and 1986.[3] On January 27, 1986, Harte, then a project engineer, left active work because of cardiac problems (angina from a prior anteriolateral myocardial infarction). He did not apply for, or receive, state worker's compensation benefits. He did, however, file for, and receive, long term disability (LTD) benefits through the company's benefits program, which he was still receiving as of the date he learned that he had been severed. His application noted that he was not eligible for worker's compensation benefits. Although his application suggests that his disability was partly due to job-related stress and job-related exhaustion from travel and field work, and his doctor's accompanying statement of disability included an assertion that Harte was incapable of work because his cardiac condition is incompatible with "much stress at company", the doctor also included a notation that Harte's disability was not "due to injury or sickness arising out of patient's employment."

On January 27, 1988, after crediting Harte with 14 years, 11 months, and 11 days of "continuous service," Bethlehem terminated his service. This left Harte nineteen days short of being eligible for pensions which would provide greater

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(1981); in misunderstanding the import of a reimbursement agreement; in holding that Bethlehem did not "wilfully discriminate" against Harte; in holding that Bethlehem did not violate COBRA; in holding that Harte's bridging of service request was barred by the statute of limitations; and in holding that ERISA's rule of parity did not apply. We find none of these arguments to have merit and reject them without further discussion.

[3] Harte also worked for Bethlehem briefly in 1952 and again between 1962 and 1967. One of his arguments on appeal, that we reject without further discussion, *see supra* note 2, is that this previous employment must be used to calculate the time he can credit towards his pension.

benefits than the deferred vested pension to which he is currently entitled.

The Bethlehem Plan provides that continuous service breaks two years after active employment ends due to layoff or a disability, but does not break if an employee leaves active employment due to a "compensable disability incurred during course of employment."[4] Michael Dopera, plan

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[4] 4. In section 5.1 the term "continuous service" is defined (emphasis added):

The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided, prior to retirement calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred:

(a) There shall be no deduction for any time lost which does not constitute a break in continuous service, except that in determining length of continuous service for pension purposes:

(1) that portion of any absence which continues beyond two years from commencement of absence due to a layoff or disability shall not be creditable as continuous service; provided, however, that *absence in excess of two years due to a compensable disability incurred during course of employment shall be creditable as continuous service,* if the Employee is returned to work or retires within 30 days after final payment of statutory compensation for such disability or after the end of the period used in calculating lump sum payment...

(b) Continuous service shall be broken by:

(4) absence which continue for more than two years, except that

(i) absence in excess of two years due to *a compensable disability incurred during course of employment* shall not break continuous service, provided the Employee is returned to work or retires . . . . ; (ii) if an Employee is absent on account of layoff or disability in excess of two years . . .

administrator of the Bethlehem Pension Plan, testified by deposition that he broke Harte's continuous service in January 1988, because Harte left for medical reasons but did not have a "compensable disability" within the meaning of the plan. According to Dopera, "compensable disability incurred during course of employment" has always been interpreted by his office to apply only to those disabilities "where the recipient is getting worker's compensation benefits"; not those in which the employee is compensated by the company. Dopera acknowledged that there was no document available to the employees in which this interpretation was announced or formalized. Nor did he suggest that the plan mandated that interpretation, but rather that the plan "provides that we have the right to *interpret* provisions under the administration section. We *interpret* the compensable disability [incurred] during course of employment to mean someone actually getting worker's compensation payments." (Emphasis added.)

In November 1995, Harte received a letter stating that his continuous employment had been severed as of January 27, 1988, seven years and ten months earlier, and that he was eligible for a deferred vested pension. He immediately objected and wrote several letters to the company. Bethlehem apologized for not informing him earlier, blaming the lack of official notice on a "clerical error." Bethlehem represents that it has a policy of notifying plan participants that their service has been broken shortly after the severance and there is no evidence that it does not generally do so, or that Bethlehem was acting in bad faith when it failed to notify Harte in 1988.

Harte filed suit in District Court advancing several claims. As far is as is relevant for this appeal, the Court rejected Harte's contention that Bethlehem had an obligation to notify him when he was severed because: (1) it concluded that there was no evidence that Bethlehem had acted in bad faith; and (2) it believed that there was no fiduciary obligation to inform

Harte that his service had broken. The Court granted summary judgment across the board for Bethlehem, and this appeal followed.[5] After we issued a panel opinion reversing the judgment and remanding the case on the breach of fiduciary duty claim, Bethlehem Steel petitioned for rehearing and rehearing en banc. We granted the petition for the panel rehearing so that we might clarify and narrow our opinion in light of some of the arguments raised therein.

II.

Harte seeks equitable relief under ERISA § 502(a)(3) (codified at 29 U.S.C. § 1132(a)(3)), a "catchall" provision, which "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity v. Howe*, 516 U.S. 489, 512 (1996). The alleged violation of ERISA involves § 404, which defines fiduciary duties owed by plan administrators to their beneficiaries. Section 404(a)(1) provides that:

> a. fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

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[5] We exercise plenary review over such a decision, *see Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996), and apply the same test the District Court should have applied in the first instance, *see Lawrence v. National Westminster Bank, New Jersey*, 98 F.3d 61, 65 (3d Cir. 1996). We must therefore determine whether the record, when viewed in the light most favorable to Harte, shows that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. *See Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 980 (3d Cir. 1998).

> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

29 U.S.C. § 1104.

In interpreting claims similar to those of Harte, we have looked to ERISA's policy declarations to aid our understanding of the scope of the fiduciary duty:

> [O]wing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans. . .
>
> It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §§ 1001(a),(b). These statements demonstrate that ERISA was enacted, in part, to ensure that employees receive sufficient information about their rights under employee benefit plans to make well-informed employment and retirement decisions. *See Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1012 (3d Cir. 1997). The goals of the "fiduciary duty jurisprudence" arising out of ERISA are " 'to

protect and strengthen the rights of employees, to enforce fiduciary standards, and to encourage the development of private retirement plans.'" *Id.* at 1014 (quoting *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996)).[6]

The Supreme Court has recognized that the contours of fiduciary duties must be defined by the courts in "develop[ing] a federal common law of rights and obligations under ERISA-regulated plans." *Varity*, 516 U.S. at 497 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989)). In our own efforts to develop a federal common law of ERISA rights, we have held that administrators generally have a fiduciary duty "not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures." *Unisys*, 57 F.3d at 1264. A misleading statement or omission by a fiduciary is actionable if "there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision." *Unisys*, 57 F.3d at 1264. This is an issue for the fact-finder if reasonable minds can differ on whether a misleading statement or omission would affect a reasonable employee's retirement decision. *See Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993).

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[6] These ends are partially served through ERISA's reporting requirements. But the fiduciary duty to disclose and explain is not achieved solely by technical compliance with the statutory notice requirements. In *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255 (1995), we stated that

> satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.

Id. at 1264.

This case does not involve affirmative misrepresentations in the traditional sense. However, we have made clear that a fiduciary not only has a negative duty not to misrepresent material facts to plan beneficiaries, but also a corresponding affirmative duty to speak "when the trustee knows that silence might be harmful." *Bixler v. Central Pa. Teamsters Health & Welfare Fund,* 12 F.3d 1292, 1300 (3d Cir. 1993). The duty extends to "those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection." *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.,* 93 F.3d 1171, 1182 (3d Cir. 1996). "The duty to disclose material information is the core of a fiduciary's responsibility." *Id.* at 1281 (quoting *Bixler,* 12 F.3d at 1300).

In *Bixler,* a widow sued her husband's former employer for failing to provide complete and accurate information about her insurance options, a failure which she claimed harmed her by leading her not to select a particular option. *See* 12 F.3d at 1296. We held that an ERISA fiduciary who explains insurance benefits has a "duty to convey complete and accurate information," and remanded part of the case to the district court to determine whether material facts were withheld from her and whether the defendant was acting as a fiduciary. *Id.* at 1302.

In *Jordan v. Federal Express Corp.,* 116 F.3d 1005, 1006-10 (3d Cir. 1997), the plaintiff learned—only after retirement and divorce—that he could not transfer the benefits of his plan to his new wife, and that the plan was irrevocable. These details about the plan were in the plan document itself, but Jordan never requested nor received a complete copy of the plan, and he claimed that he would have chosen a different plan had he known. He did receive a written summary of his retirement options that did not include a reference to irrevocability. He never requested particular information

about revocability. We held that a reasonable fact-finder could conclude that, despite its full compliance with ERISA and plan-based reporting requirements, the plan administrator had breached its fiduciary duty by failing to provide him this information. *See id.* at 1016. More specifically, we held that there was a genuine issue of material fact as to whether irrevocability was the kind of thing likely to affect a reasonable employee's retirement decisions, and whether a failure to explain it constituted a breach of the fiduciary's duties. *See id.* at 1017.

Bethlehem argues that *Jordan* is inapposite to this case because in *Jordan* the plan administrator had provided incomplete information. *See id.* at 1016-17. It contends that sending Jordan information triggered a duty to provide complete information about the plan, and since Bethlehem did not provide any information, a duty of completeness cannot have been triggered here. This argument fails for two reasons. First, as we have recognized before, without the administrator providing the relevant information, "the beneficiary may have no reason to suspect that it should make inquiry into what may appear to be a routine matter." *Glaziers,* 93 F.3d at 1181. The *Jordan* panel relied on this logic, as well as the fact that the fiduciary was providing some information, in its finding that there was a disputed issue regarding the duty to inform. *See* 116 F.3d at 1016. Second, and perhaps more importantly, providing a written plan is itself an affirmative act. In a plan, as in a summary plan document, beneficiaries have reason to expect that complete information about all material provisions is available to them when they review the document. Confusing or incomplete information in a plan is at least as likely to cause reliance as is confusing or incomplete information in a summary of the plan. Indeed, when a summary plan or letter includes incomplete information, the employee retains the possibility of reviewing the entire plan, whereas there are no

more authoritative documents to review when the potentially misleading provision is in the plan itself.

Therefore, we conclude that an administrator who does not inform a beneficiary that his employment is severed when he might predictably and reasonably presume, after reading the pertinent part of the plan, that he is still employed, may be held liable for a breach of fiduciary duty. The "duty to convey complete and accurate information," *Bixler,* 12 F.3d at 1302, logically encompasses a duty to use clear language when describing severance terms in a plan, or explain them when they are unclear and likely to be misunderstood. A fiduciary's failure to notify an employee that he has been severed when he might predictably and reasonably presume, on the basis of the plan, that his service is unbroken, falls within the category of breaches of duty for "failure to disclose" outlined in *Bixler, Jordan, Glaziers,* and *Unisys.* Naturally, in considering the "reasonableness" of a beneficiary's interpretation, the company's own pronouncements and widely-known company practice must be taken into account; if a company adequately informs beneficiaries of its interpretation of a term (when it retains discretion to interpret), it would be patently unreasonable to understand it otherwise. Relatedly, although we focus on whether Bethlehem's failure to notify in this case might be actionable, we note that it could have fulfilled its duties by using clear language in the plan—e.g., a statement that "compensable disability" only applied to individuals receiving worker's compensation benefits.

In order to place our holding in perspective it will be useful to make clear what we are not holding, i.e., that a fiduciary may have an independent duty to inform a beneficiary of its interpretation of a plan *at any point before* the time at which his service was broken. Such a claim is not before us, and

might implicate administrative burdens not present here.[7] Likewise, and for similar reasons, we are also confining our holding to situations where an employee is severed. We need not address whether other changes in status would give rise to a similar fiduciary duty to notify. Harte merely argues—and we agree—that an administrator acting with care, skill, prudence and diligence would notify a beneficiary that he is severed pursuant to a plan interpretation when the beneficiary could predictably and reasonably rely on a different interpretation.

The petition for rehearing relies heavily on *Maxa v. John Alden Life Insurance Co.*, 972 F.2d 980 (8th Cir. 1992) for its argument that there can never be a duty to inform individual beneficiaries, who have not inquired, about the interpretation of plan provisions. In *Maxa*, the plaintiff claimed that his father's employing company had breached its fiduciary duty by not informing him that his benefits would be reduced by the Medicare coverage he could have received. *See id.* at 982. That court concluded that ERISA imposes no such duty, reasoning that it would be institutionally impossible to inform each and every participant about the effects of all terms in a summary plan description on their benefits. While the *Maxa* court determined that the part of the summary plan which described the benefits-reduction was not entirely clear, the section in which it discussed the ambiguity of the term was analytically separate from the section in which it discussed the lack of a fiduciary duty individually to warn. Moreover,

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[7] The burdens on an employer are relevant in analyzing whether the ERISA administrator "discharge[d] his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104.

the *Maxa* plaintiff demonstrated no reliance. We read *Maxa* as standing for the uncontroversial proposition that a fiduciary does not have to regularly inform beneficiaries every time a plan term effects them.[6]

Interestingly, *Maxa* also cites (indirectly, by way of *Stahl v. Tony's Building Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989)) this Court's affirmance of a District Court case, *Allen v. Atlantic Richfield Retirement Plan*, 480 F. Supp. 848, 851-52 (E.D. Pa. 1979), *affd*, 633 F.2d 209 (3d Cir. 1980). That case actually helps explain our position, for although it held that there was no duty to warn, it did so in part *because* the summary plan document was clear: "There was nothing 'misleading or incomprehensible' in the booklet's explanation of the waiting period, and an 'average and reasonable worker participant' could easily understand" the requirement at issue. *Allen*, 480 F. Supp. at 851. As we explain presently, this case is very different.

We are not blind to the potential administrative strain on an ERISA administrator. A broad fiduciary duty to inform beneficiaries about the effects of all plan provisions upon them could give rise to a "practically impossible burden of anticipating, and comprehensively addressing, the individualized concerns of thousands of employees." *Childers v.*

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[8] In the cases on which it relies in the duty-to-warn section of the opinion, plaintiffs sought notification of the effect of straightforward terms on their particular circumstances. *Maxa* cited, for example, *Stahl v. Tony's Building Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989), in which the Ninth Circuit held that when there was no evidence concerning the feasibility of individual notice, there was no duty to inform individual participants about the effect of terms which were "adequately explained" in the summary plan description. *Id.* at 1410. It also cited *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357 (D. Minn. 1988), in which the court held that there was no duty individually to notify plaintiffs about the potential bad side effects of accepting promotions when the summary plan descriptions were adequate. *See id.* at 1361.

Northwest Airlines, Inc., 688 F. Supp. 1357, 1362 (D. Minn. 1988). However, in this case at least, there is no evidence that it is too great a burden for Bethlehem Steel to inform plan participants when they are severed. In fact, notification was Bethlehem Steel's own policy. This case could have been avoided were there a mechanism to ensure the effectiveness of that policy.

III.

The disputed phrase is:

> [A]bsence in excess of two years due to *a compensable disability incurred during course of employment* shall not break continuous service.

The meaning of this phrase affects whether one's employment is considered continuous or broken off, and hence a fact-finder could conclude that a fiduciary acting with care, skill, and prudence would know that an employee would want—and need—to know whether his or her disability fell within this category. It is the kind of phrase that one could conclude is likely to "mislead a reasonable employee in making an adequately informed retirement decision." *Unisys*, 57 F.3d at 1264.

Bethlehem submits that this phrase has consistently been interpreted to cover only those cases where a participant applied for and received worker's compensation for a work-related injury. However, Dopera himself called his reading of the phrase an "interpretation," suggesting that the language did not mandate a particular result. Although the phrase *could* refer only to those disabilities arising out of work, a reasonable person could reasonably and predictably read this phrase to apply to any disability, illness, or injury that came upon an employee during the broad time frame of "active employment." Certainly, someone such as Harte who was actually receiving compensation for his medical condition through Bethlehem's long term disability program could

predictably think that he had suffered a "compensable disability incurred during course of employment."

Of course, the phrase we question cannot be read in a vacuum, and it is possible that Bethlehem Steel will present evidence at trial that will demonstrate that in the context of employment with that company, it was not reasonable to expect that the phrase would be interpreted more broadly than it was. However, construing the facts in the light most favorable to Harte, as we must at this juncture, we conclude that the phrase was interpreted in a manner such that a fact-finder could decide that the administrator should have anticipated that Harte would predictably rely on a reasonable, but different, interpretation.

As to the detrimental reliance question, Bethlehem Steel argues that there is insufficient evidence that Harte relied on the presumption that he was not severed. Therefore, the argument continues, since no harm flowed from the failure of communication, the failure to notify should not be actionable. Harte counters that had he learned of his severance, either immediately or within a short time afterwards, he would have taken several steps. He submits that he could have gone back to work for nineteen days and then attempted to join those days to his previous fourteen odd years (as the plan allows), or, alternatively, he could have applied for different pensions or invested in separate insurance.

Bethlehem Steel notes that Harte had no absolute right to return to work, and that he was physically infirm and incapable of working according to his own physician. However, just as we cannot assume that Bethlehem Steel would have responded favorably to an entreaty for a brief, three week return, we similarly cannot assume that it would not have. Although Harte's cardiac condition might have been incompatible with long term labor, he might have been able to put in a few weeks of consulting (his work did not

require heavy labor) to achieve his desired pension, and Bethlehem Steel might have accommodated him. Harte's long term disability application is far from clear on his ability to work for a short period of time. He answered "yes" to the question whether he was "wholly unable to engage in any and all work, and any and every occupation of business" but also suggested that travel, field work, and stress contributed to his disability. His doctor gave slightly contradictory indications in the accompanying statement of disability, noting that Harte was "totally disabled" but also that he was "Class 4", i.e., "capable of clerical/administrative ('sedentary') activity." (394). A fact-finder could conclude from the self-diagnosis and the medical diagnosis that while long term work in his old capacity might have been impossible, a three week tour in a clerical position might have been feasible for Harte. Moreover, as noted above, Harte could have sought out alternate sources of insurance.

We are satisfied that although Harte had no absolute right to return to work and possibly lacked the ability to do so, a reasonable fact-finder could conclude, even on this spare record, that had he known that he was no longer receiving credit for "continuous service" he could have acted in some manner to protect himself.[9] Now, eight years later, his physical condition may have deteriorated such that he can no longer obtain the protections he might previously have sought.

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[9] Bethlehem Steel also argues that even if it had a duty to notify Harte, it would not apply to the moment of discharge, but rather, as is its policy, "within a reasonable period following a break in service." Therefore, "[t]he date on which Plaintiff received a Notice of Deferred Vested Pension could not possibly alter the benefits to which he is entitled under the Plan." We need not settle on a precise date on which notification would be required, because Harte claims that there are actions he could have undertaken even had he been notified within a short time after the break.

In view of the foregoing, the judgment with respect to the claim for a breach of fiduciary duty for failure to notify will be vacated, and the case remanded to the District Court for further proceedings. In all other respects the judgment will be affirmed. Parties to bear their own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-2052

ROBERT J. HARTE,

Appellant

v.

BETHLEHEM STEEL CORPORATION; GENERAL PENSION BOARD OF THE BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; MICHAEL P. DOPERA, Secretary, Employee Benefits Administration Committee

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On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-06528)
District Judge: Honorable Edward N. Cahn

Argued: September 28, 1999

Before: BECKER, *Chief Judge*, McKEE, and NOONAN [*] *Circuit Judges.*

(Opinion Filed February 29, 2000)

Panel Rehearing Granted March 21, 2000

Submitted Under Third Circuit LAR 34.1(a)
April 17, 2000

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[*] Honorable John Noonan, United States Circuit Judge for the Ninth Circuit, sitting by designation.

(Opinion Filed May 26, 2000)

ORDER AMENDING OPINION

The slip opinion in the above case filed May 26, 2000 is hereby amended as follows:

1. On page 4, line 14, change the words "they have" to "he has."

2. On page 14, line 12, change the word "effects" to "affects."

3. On page 17, line 7, delete "(394)."

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

DATED: 19 July 2000

APPENDIX E

[Filed February 29, 2000]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-2052

ROBERT J. HARTE,

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BETHLEHEM STEEL CORPORATION; GENERAL PENSION BOARD OF THE BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; MICHAEL P. DOPERA, Secretary, Employee Benefits Administration Committee

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Before: BECKER, *Chief Judge*, McKEE, and NOONAN [*] *Circuit Judges*.

(Filed: February 29, 2000)

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[*] Honorable John Noonan, United States Circuit Judge for the Ninth Circuit, sitting by designation.

OPINION OF THE COURT

BECKER, *Chief Judge*.

This appeal, arising out of a claim for pension benefits under ERISA, is set in the familiar factual pattern of an employee's being denied a more advantageous pension because of a minor shortfall in the required period of service. Robert J. Harte had accrued credit for fourteen years, eleven months, and eleven days at Bethlehem Steel when the benefits plan administrator terminated his continuous service (for pension purposes) because Harte had been absent from work for two years. When Harte's service was terminated, he was nineteen days short of eligibility for the "70/80" pension he now seeks. Harte claims that he did not learn that his service had been "broken," and hence that he had not accrued the fifteen years required for the pension, until approximately eight years later. After finally being notified of his shortfall, Harte sued, raising a host of arguments for why Bethlehem was required to give him the 70/80 pension, including arguments as to why his continuous service should never have been severed. The District Court granted summary judgment for Bethlehem.

Harte's strongest claim is a breach of fiduciary duty claim. He argues that (1) the plan document was ambiguous about when a break in service would be effected, (2) he reasonably believed that he was still employed under the terms of the plan, and therefore (3) Bethlehem, as an ERISA fiduciary, should have *at least* notified him that it was about to break his service. The primary issue presented by this appeal is whether ERISA requires plan administrators, as fiduciaries, to timely inform plan beneficiaries that their service is being broken if the severance is made pursuant to an ambiguous plan provision that a reasonable person could interpret

differently from the administrator. We conclude that it does, giving rise to the ancillary issues of whether the plan provision is ambiguous, whether it is material, and whether Harte detrimentally relied on it.

The phrase at issue in this case is "compensable disability." The Bethlehem plan provides that an employee may receive a 70/80 pension after fifteen years of "continuous service." It states that although continuous service is broken two years after leaving work for a disability, it is not broken if the reason for leaving is a "compensable disability incurred during course of employment." Bethlehem represents that the plan administrator, within his authority, has consistently interpreted this phrase to apply only to work-related disabilities that are compensated by state worker's compensation, which Harte did not receive. However, Harte applied for, received, and continues to receive, compensation for his disability through the company's long term disability program. On this ground, he contends that his service should never have been broken because he has a "compensable disability incurred during course of employment." He submits that the term "compensable disability" is ambiguous as to whether it comprehends long term disability benefits as well as worker's compensation benefits.

Although we agree with Bethlehem that the plan administrator had the authority to make the interpretation that he did and to effect the severance, our precedent requires us to conclude that the company also had a fiduciary duty to timely inform Harte of its interpretation. We have consistently held that a fiduciary may not make inconsistent or confusing statements or fail to disclose material facts about a plan. It follows that when a material plan provision regarding severance is ambiguous and beneficiaries might predictably rely on an alternate interpretation, a fiduciary may be held liable for failing to inform them that their service has been broken at a time at which they could attempt corrective

action or seek alternatives.

In short, a plaintiff may succeed on a claim under § 502(a)(3) of ERISA when he adduces evidence that (1) a plan provision is material; (2) it is susceptible of multiple reasonable interpretations; (3) the plaintiff relied on it to his detriment; and (4) the company did not timely notify the plaintiff of its interpretation. We therefore vacate the grant of summary judgment and remand the case for further proceedings on the breach of fiduciary duty claim.[1] The District Court properly granted summary judgment for Bethlehem on all other issues, and we affirm summarily with respect to these claims.[2]

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[1] Bethlehem argues that Harte should not be allowed to proceed on this claim because it was inadequately pled. Harte did not cite § 502(a)(3) in his complaint, nor did he seek to amend the complaint. His complaint does, however, allege the lack of notification, and his papers refer to several cases that revolve around § 502(a)(3) claims. Moreover, the District Court discussed this claim in the context of one of those cases, *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3rd Cir. 1993) (a breach of fiduciary duty case that we discuss more fully infra Section II). We are satisfied that, given our broad notice pleading standards, Harte's breach of fiduciary duty claim has been adequately pled.

[2] Harte contends that, given the ambiguity of the plan provisions, Bethlehem could not interpret the plan in a fashion that inhered to its own benefit. However, under the aegis of *Firestone Tire and Rubber Co.* v. *Bruch*, 489 U.S. 101, 114-15 (1989), when an ERISA plan provides the plan administrator with fiduciary discretion, courts generally use the arbitrary and capricious standard to review the administrator's decisions, Paragraphs 5.3(a) and 8.1 of the Bethlehem plan grant the administrator the discretion to interpret the "continuous service" provision. Even where the company is both the plan sponsor and plan administrator we have applied the arbitrary and capricious standard of *Bruch*. *See Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 n.5 (3d Cir. 1993). Applying that standard, Bethlehem's plan administrator did not abuse his discretion when he concluded that Harte did not have a "compensable disability incurred during course of employment." Reviewing the documents

I.

As far as is pertinent to this appeal, Harte worked at Bethlehem in several capacities between 1973 and 1986.[3] On January 27, 1986, Harte, then a project engineer, left work because of cardiac problems (angina from a prior anteriolateral myocardial infarction). He did not file for, or receive, state worker's compensation benefits. He did, however, file for, and receive, long term disability (LTD) benefits through the company's benefits program, which he was still receiving as of the date he filed the present lawsuit. On January 27, 1988, after crediting Harte with 14 years, 11 months, and 11 days of "continuous service," Bethlehem terminated his service. This left Harte nineteen days short of being eligible for pensions which would provide greater benefits than the deferred vested pension to which he is currently entitled.

The Bethlehem Plan provides that continuous service breaks two years after active employment ends due to layoff or a disability, but does not break if an employee leaves active employment due to a "compensable disability incurred during course of employment."[4] Michael Dopera, plan

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available to him, there was no clear indication that his disability was work-based, and it was within the plan administrator's discretion to conclude that those on worker's compensation should be credited for continuous service for the time that they were on worker's compensation, while those who left for other disability-based reasons should not be so credited. The issue decided in the text is, of course, a different one.

[3] Harte also worked for Bethlehem briefly in 1952 and again between 1962 and 1967. His claim that his previous service must be used to calculate the time he can credit towards his pension claims is patently without merit and we reject it without further discussion.

[4] In section 5.1 the term "continuous service" is defined (emphasis added):

> The term "continuous service" as used in this Plan means

administrator of the Bethlehem Pension Plan, testified by deposition that he broke Harte's continuous service in January 1988, because he left for medical reasons but did not have a "compensable disability" within the meaning of the plan. According to Dopera, "compensable disability incurred

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> continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided, prior to retirement calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred:
>
> > (a) There shall be no deduction for any time lost which does not constitute a break in continuous service, except that in determining length of continuous service for pension purposes:
> >
> > > (1) that portion of any absence which continues beyond two years from commencement of absence due to a layoff or disability shall not be creditable as continuous service; provided, however, that *absence in excess of two years due to a compensable disability incurred during course of employment shall be creditable as continuous service*, if the Employee is returned to work or retires within 30 days after final payment of statutory compensation for such disability or after the end of the period used in calculating lump sum payment
> >
> > . . .
> >
> > (b) Continuous service shall be broken by:
> >
> > > (4) absence which continue for more than two years, except that (i) absence in excess of two years due to *a compensable disability incurred during course of employment* shall not break continuous service, provided the Employee is returned to work or retires . . . .; (ii) if an Employee is absent on account of layoff or disability in excess of two years . . .

during course of employment" has always been interpreted by his office to apply only to those disabilities "where the recipient is getting worker's compensation benefits." Dopera conceded that there was no document available to the employees in which this interpretation was announced or formalized. Nor did he suggest that the plan mandated that interpretation, but rather that the plan "provides that we have the right to *interpret* provisions under the administration section. We *interpret* the compensable disability occurred during course of employment to mean someone actually getting worker's compensation payments." (emphasis added).

In November 1995, Harte received a letter stating that his continuous employment had been severed as of January 27, 1988, seven years and ten months earlier, and that he was eligible for a deferred vested pension. He immediately objected and wrote several letters to the company. Bethlehem apologized for not informing him earlier, blaming the lack of official notice on a "clerical error." Bethlehem represents that it has a policy of notifying plan participants that their service has been broken shortly after the severance and there is no evidence that it does not generally do so, or that Bethlehem was acting in bad faith when it failed to notify Harte in 1988.

Harte filed suit in District Court advancing several claims. As far is as is relevant for this appeal, the Court rejected Harte's contention that Bethlehem had an obligation to notify him when he was severed because: (1) it concluded that there was no evidence that Bethlehem had acted in bad faith; and (2) it believed that there was no fiduciary obligation to inform Harte that his service had broken. The Court granted summary judgment across the board for Bethlehem, and this appeal followed.[5]

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[5] We exercise plenary review over such a decision, *see Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996), and apply

II.

Harte seeks equitable relief under ERISA § 502(a)(3) (codified at 29 U.S.C. § 1132(a)(3)), a "catchall" provision, which "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy," including violations of § 404. *Varity v. Howe*, 516 U.S. 489, 512 (1996). The alleged violation of ERISA involves § 404 (codified at 29 U.S.C. § 1104), which defines fiduciary duties owed by plan administrators to their beneficiaries.[6]

In its declaration of policy, ERISA states:

> [O]wing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards

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the same test the District Court should have applied in the first instance, *see Lawrence v. National Westminster Bank, New Jersey*, 98 F.3d 61, 65 (3d Cir. 1996). We must therefore determine whether the record, when viewed in the light most favorable to Harte, shows that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. *See Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 980 (3d Cir. 1998).

[6] Section 404(a)(1) provides that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> . . .

> be provided with respect to the establishment, operation, and administration of such plans.
>
> . . .
>
> It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §§ 1001(a),(b).

In interpreting similar claims, we have looked to these statements and noted that ERISA was enacted, in part, to ensure that employees receive sufficient information about their rights under employee benefit plans to make well-informed employment and retirement decisions. *See Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1012 (3rd Cir. 1997). The goals of the "fiduciary duty jurisprudence" arising out of ERISA are " 'to protect and strengthen the rights of employees, to enforce fiduciary standards, and to encourage the development of private retirement plans.' " *Id.* at 1014 (quoting *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996)).

These ends are partially served through ERISA's reporting requirements. But the fiduciary duty to disclose and explain is not achieved solely by technical compliance with the statutory notice requirements. In *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255 (1995), we stated that

> satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not

> foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.

Id. at 1264.

The contours of these duties must be defined by the courts in "develop[ing] a federal common law of rights and obligations under ERISA-regulated plans." *Varity*, 516 U.S. at 497 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989)). Administrators have a fiduciary duty "not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures." *Unisys*, 57 F.3d at 1264. Not all misleading statements or omissions by a fiduciary are actionable, only those that are material. A representation or omission is material if "there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision." *Unisys*, 57 F.3d at 1264. The issue of materiality is a matter for the fact-finder if reasonable minds can differ on whether a misleading statement or omission would affect a reasonable employee's retirement decision. *See Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993).

This case does not involve affirmative misrepresentations. However, we have made clear that a fiduciary not only has a negative duty not to misrepresent material facts to plan beneficiaries, but also a corresponding affirmative duty to speak "when the trustee knows that silence might be harmful." *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3rd Cir. 1993). The duty extends to "those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own

protection." *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1182 (3rd Cir. 1996). "The duty to disclose material information is the core of a fiduciary's responsibility." *Id.* at 1281 (quoting *Bixler*, 12 F.3d at 1300).

In *Bixler*, a widow sued her husband's former employer for failing to provide complete and accurate information about her insurance options, a failure which she claimed harmed her by leading her not to select a particular option. *See* 12 F.3d at 1296. We held that an ERISA fiduciary who explains insurance benefits has a "duty to convey complete and accurate information," and remanded part of the case to the district court to determine whether material facts were withheld from her and if the defendant was acting as a fiduciary. *Id.* at 1302.

In *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1006-10 (3rd Cir. 1997), the plaintiff learned—only after retirement and divorce—that he could not transfer the benefits of his plan to his new wife, and that the plan was irrevocable. These details about the plan were in the plan document itself, but Jordan never requested nor received a complete copy of the plan, and he claimed that he would have chosen a different plan had he known. He did receive a written summary of his retirement options that did not include a reference to irrevocability. Nonetheless, we held that a reasonable fact finder could conclude that, despite its full compliance with ERISA and plan-based reporting requirements, the plan administrator had breached its fiduciary duty by failing to provide him this information. *See Id.* at 1016.

Bethlehem argues that *Jordan* is distinguishable because in *Jordan* the plan administrator had already acted and provided incomplete information. *See id.* at 1016-17. It contends that sending Jordan information triggered a duty to provide complete information about the plan, and since Bethlehem

did not provide any information, a duty of completeness cannot have been triggered here. This argument fails for two reasons. First, the *Jordan* panel did not base the duty to inform completely on the company's prior limited effort at communication. *See Id.* Second, providing a written plan is itself an affirmative act. In a plan, as in a summary plan document, beneficiaries have reason to expect that complete information about all material provisions is available to them when they review the document. Confusing or incomplete information in a plan is at least as likely to cause reliance on a reasonable misinterpretation as is confusing or incomplete information in a summary of the plan. Indeed, when a summary plan or letter includes incomplete information, the employee retains the possibility of reviewing the entire plan, whereas there are no more authoritative documents to review when the ambiguous provision is in the plan itself.

Therefore, we conclude that there is an incomplete disclosure when, as in this case, a material plan provision, easily accessible by a beneficiary, uses terms that are susceptible to reasonable misinterpretation and detrimental reliance thereon. Naturally, in considering the "reasonableness" of a beneficiary's interpretation, the company's own pronouncements and widely-known company practice must be taken into account; if a company adequately informs beneficiaries of its interpretation of a term (when it retains discretion to interpret), it would be patently unreasonable to understand it otherwise.[7] The "duty to convey complete and accurate information," *Bixler*, 12 F.3d at 1302, logically encompasses a duty to use clear language when describing material terms in a plan, or explain it when it is unclear. The

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[7] Although we focus on Bethlehem's failure to notify in this case, we note that it could just as easily have fullfiled its fiduciary duties by using clear language in the plan—i.e., a statement that "compensable disability" only applied to individuals receiving state worker's compensation.

failure to notify a beneficiary that his or her service is being broken pursuant to an ambiguous provision falls within the category of breaches of duty for "failure to disclose" outlined in *Bixler*, *Jordan*, *Glaziers*, and *Unisys*.

III.

Applying this framework, we conclude that Bethlehem should not have been granted summary judgment on Harte's breach of fiduciary duty claim. The term "compensable disability incurred during the course of employment" is a material term in the context of the plan. The meaning of the phrase affects whether one's employment is considered continuous or broken off, and a fiduciary acting with care, skill, and prudence would know that an employee would want—and need—to know whether his or her disability fell within this category. It is the kind of phrase that is likely to "mislead a reasonable employee in making an adequately informed retirement decision." *Unisys*, 57 F.3d at 1264. If Harte knew that he was not included in this category, he could have tried to return to less strenuous work for at least nineteen days, or attempted to find work, either at Bethlehem or elsewhere, that would allow him to receive better insurance, or he could have encouraged his wife to seek employment that would better insure them both.

> The disputed phrase is:
>
> [A]bsence in excess of two years due to *a compensable disability incurred during course of employment* shall not break continuous service.

Bethlehem claims that this phrase has consistently been interpreted to cover only those cases where a participant applied for and received worker's compensation for a work-related injury. However, Dopera himself called his reading of the phrase an "interpretation," suggesting that the language

did not mandate a particular result. Although the phrase *could* refer only to those disabilities arising out of work, a reasonable person could also read this phrase to apply to any disability, illness, or injury that came upon an employee during the broad time frame of "active employment." Certainly, someone such as Harte who was actually receiving compensation for his medical condition through Bethlehem's long term disability program could think that he had suffered a "compensable disability."[8] There is a genuine issue of material fact as to whether the phrase is susceptible of multiple reasonable interpretations.

Of course, this phrase cannot be read in a vacuum, and it is possible that Bethlehem will present evidence at trial that will demonstrate that in the context of employment with that company, it was not reasonable to expect that the phrase would be differently interpreted. However, construing the facts in the light most favorable to Harte, as we must at this juncture, we conclude that the phrase was susceptible to at least two reasonable interpretations, one of which would cover someone like Harte, who was receiving compensation through long term disability benefits.

As to the detrimental reliance question, Bethlehem argues that there is insufficient evidence that Harte relied on his misinterpretation of the plan. Therefore, the argument continues, since no harm flowed from the failure of communication, the failure to notify should not be actionable. Harte counters that had he learned of his severance, either immediately or within a short time afterwards, he would have taken several steps. He submits that he could have gone back

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[8] Harte also claims that his illness was due in part to the stress of work, and adduced evidence that his doctor, at the time he left Bethlehem, concurred in this view. This evidence adds weight to his claim that he reasonably believed that his disability was "incurred during the course of his employment."

to work for nineteen days and then attempted to join those days to his previous fourteen odd years (as the plan allows), or, alternatively, he could have applied for different pensions or invested in separate insurance. Although Harte has not put evidence in the record of alternate pensions for which he could have applied, we believe that he could have at least attempted to return to work.

Bethlehem notes that he had no absolute right to return to work, and that Harte was physically infirm and incapable of working according to his own physician. However, just as we cannot assume that Bethlehem would have accepted a petition for such a brief tour of duty, we similarly cannot assume that it would not have. Harte had cardiac troubles, and now claims that he has Parkinson's disease. Although these disabilities may be incompatible with long term labor, Harte might have been able to put in a few weeks of consulting (his work did not require heavy labor) to achieve his desired pension, and Bethlehem might have accommodated him. Moreover, as noted above, Harte could have sought out alternate sources of insurance. We are satisfied that although Harte had no absolute right to return to work and possibly lacked the ability to do so, a reasonable jury could conclude, even on this spare record, that had he known that he was no longer receiving credit for "continuous service" he could have acted in a way to protect himself.[9] Now, eight years later, his

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[9] Bethlehem also argues that even if it had a duty to notify Harte, it would not apply to the moment of discharge, but rather, as is its policy, "within a reasonable period following a break in service." Therefore, "[t]he date on which Plaintiff received a Notice of Deferred Vested Pension could not possibly alter the benefits to which he is entitled under the Plan." However, Bethlehem's internal policy of notification does not circumscribe its fiduciary duties under ERISA. If ERISA requires that fiduciaries notify individuals of ambiguities in plan documents if they might reasonably be respected to rely, to their detriment, on an incorrect reading of an ambiguity, a company may not avoid this duty by

physical condition may have deteriorated such that he can no longer obtain the protections he might previously have sought.

It may seem that any one who was away from the company as long as Harte was would have to know that they had been severed. But Harte continued to receive long term disability payments, and considered himself a disabled employee, instead of a disabled ex-employee. In sum, we believe that a jury could conclude that Harte was not even on constructive notice of Bethlehem's policy of interpreting the plan provision, or of his own severance.

In view of the foregoing, the judgment with respect to the claim for a breach of fiduciary duty for failure to notify will be vacated, and the case remanded to the District Court for further proceedings. In all other respects the judgment will be affirmed. Parties to bear their own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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establishing a lesser reporting requirement for itself.

APPENDIX F

[Filed March 21, 2000]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-2052

ROBERT J. HARTE,

Appellant

v.

BETHLEHEM STEEL CORPORATION; GENERAL PENSION BOARD OF THE BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; MICHAEL P. DOPERA, Secretary, Employee Benefits Administration Committee

(D.C. Civ. No. 97-cv-06528)

Before: BECKER, *Chief Judge*, MCKEE, and NOONAN,* *Circuit Judges.*

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by appellees having been submitted to the judges who participated in the decision of this court, the petition for panel rehearing is GRANTED. The panel opinion is vacated. Appellant shall file a memorandum within two weeks responding to the contentions set forth in the Petition for Rehearing.

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

DATED: 21 March 2000

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* Honorable John Noonan, United States Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 97-CV-6528

ROBERT J. HARTE,

Plaintiff,

v.

BETHLEHEM STEEL CORPORATION, *et al.*
Defendants.

MEMORANDUM

Cahn, C.J. October 22, 1998

On October 21, 1997, Plaintiff Robert J. Harte ("Plaintiff") filed this action against Defendants Bethlehem Steel Corporation ("Bethlehem Steel"), General Pension Board of the Bethlehem Steel Corporation and Subsidiary Companies ("General Pension Board"), and Michael P. Dopera, Secretary ("Secretary") of the Employee Benefits Administration Committee ("EBAC").[1] Plaintiff alleges that Defendants violated two sections of the Employment Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §1001 *et seq.* ("ERISA"). First, Plaintiff avers that Defendant violated Section 502(a) (1) (B), 29 U.S.C. § 1132 (a) (1) (B), and that he is entitled to the payment of enhanced pension benefits. Second, Plaintiff contends that Defendants breached Section 510, 29 U.S.C. § 1140, and that Defendants discriminated against Plaintiff and interfered with his pension rights in violation of ERISA.

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[1] EBAC administers Bethlehem's pension plans, including the 1985 Salaried Pension Plan ("1985 Plan") that is in dispute before the court.

The court must decide whether Plaintiff is entitled to enhanced benefits rather than what was awarded by the EBAC.[2] For the reasons that follow, the court holds that Plaintiff is not entitled to a more generous benefit plan.

I. BACKGROUND

Plaintiff is an individual who was previously employed by Bethlehem Steel from June 10, 1953 through September 9, 1953; from July 9, 1962 through December 8, 1967; and from February 15, 1973 through January 27, 1986. (Compl. at ¶¶ 1, 12-18, 23). On September 28, 1981, Plaintiff requested that Bethlehem Steel include his employment from 1962 through 1967 in the calculation of his continuous service for purposes of his pension. (Def.'s Br. Supp. Mot. Summ. J. at 6). The request was denied and Plaintiff was informed on April 26, 1982. *See id.* at 7. In 1984, Plaintiff again requested that his employment from 1962 to 1967 be included in the calculation of his continuous service, and on January 17, 1984, Plaintiff was advised that there was no basis for reevaluation. *See id.*

Plaintiff's last day of work for purposes of the pension plan was January 27, 1986. (Compl. at ¶ 4). Plaintiff received no salary payments from Bethlehem Steel for any period after January 27, 1986. (Def.'s Br. Supp. Mot. Summ. J. at 8). From January 28, 1986 through May 6, 1986, Plaintiff received a Disability Absence Allowance, and from May 7, 1986 through May 20, 1986, Plaintiff received vacation pay. *Id.* Plaintiff now collects long-term disability benefits and will continue to receive these benefits until he turns sixty-five (65), at which time he will become eligible to receive his Deferred Vested Pension under the 1985 Plan. (Compl. at ¶ 27). As of January 27, 1986, Plaintiff's continuous service was 12 years, 11 months and 11 days. (Def.'s Br. Supp. Mot.

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[2] Plaintiff contends that Bethlehem's 1994 Pension Plan is applicable to his claim.

Summ. J. at 10). Bethlehem Steel provided Plaintiff with an additional two years of service to bring the total to 14 years, *11 months and 11 days as of January 27, 1988. Id.* Thus, even with the additional two years of service, Plaintiff fell short of the required fifteen (15) years of continuous service.

Plaintiff is entitled to the 1985 Plan. *Id.* Under Section 5.1(b)(4) of the 1985 Plan, an employee's continuous service breaks when that employee has been absent from his job "for more than two years." [3] *Id.* In addition, when an employee's continuous service terminates and the employee has ten (10) years of service without a break, the employee becomes eligible to receive a Deferred Vested Pension, unless he is already eligible for some other pension under the 1985 Plan. (1985 Plan at § 2.8). An employee who becomes eligible for a Deferred Vested Pension may elect to receive pension payments as early as age 60 on an actuarially reduced basis or at age 65 on an unreduced basis.[4] *Id.* § 3.3(e)(3).

The 1985 Plan states that "retirement" occurs on the last day of an employee's continuous service, "provided that on such last day he was eligible for an immediate or deferred pension under this Plan." *Id.* at § 1.2(b). According to the 1985 Plan, the Plan Administrator has the authority to interpret the Plan's terms and to determine the years of continuous service to be credited to any plan participant.[5]

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[3] As of January 28, 1988, Plaintiff had been absent from work for two years. Therefore, Plaintiff's continuous service broke on this date.

[4] Plaintiff became eligible for a Deferred Vested Pension when his continuous service broke on January 27, 1988.

[5] 1985 Plan § 5.3(a). "Subject to action by the General Pension Board, the number of years of continuous service of any participant shall be conclusively determined for all purposes of this Plan by the Plan Administrator."

1985 Plan § 8.1. The Plan Administrator has the power to "make and enforce such rules and regulations . . . as the Plan Administrator shall

On October 12, 1995, Plaintiff was notified that he was eligible only for a Deferred Vested Pension Plan and that his continuous service ceased on January 27, 1988. (Pl's Admissions, No. 58 at pp. 75-76). On November 17, 1995, Plaintiff was informed that he had accrued 14 years, 11 months and 11 days of continuous service while working at Bethlehem Steel and, once again, was told he was eligible for a Deferred Vested Pension Plan. *Id.* at 62-63.

On March 1, 1996, Plaintiff requested a review of the determinations made by the Secretary in the November 17, 1995 letter. *Id.* at 65-66. On March 29, 1996, the Secretary notified Plaintiff that the EBAC had, in fact, reviewed and affirmed the Assistant Secretary's determinations. *Id.* at 67-68. On April 4, 1996, Plaintiff again wrote the Secretary, and stated that his reason for leaving Bethlehem Steel was "due to stress related work requirements, which is an occupational disability." *Id.* at 69-72. On June 12, 1996, the Secretary informed Plaintiff that the claim was reviewed and denied.[6] *Id.* at 74.

On September 30, 1996, Plaintiff received a Notice of Eligibility for Deferred Vested Pension reiterating that Plaintiff's last day of employment was January 27, 1986, and that his continuous service ended on January 27, 1988. (P1's Admissions, No. 58 at pp. 75-76). On November 7, 1996, Plaintiff received a letter that stated the reason for the

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deem necessary or proper for the efficient administration of this Plan, and to decide such questions as may arise in connection with the operation of this Plan."

[6] The Secretary stated: "Your file reflects that your absence from work from Bethlehem [Steel] was *not* due to injury arising out of your employment," and that "after a complete review of your case, the committee has concluded that, pursuant to sections 2 and 5 of the Plan, there is no basis to change the determination previously made in this matter." (Plaintiff's Admissions, No. 58 pp. 75-76).

continuous service break was the "end of two year period of disability." [7] *Id.* at 77-78.

On April 18, 1997, Donald Russo, Plaintiff's attorney, wrote to the Secretary. Russo asserted that Plaintiff was entitled to more than fifteen (15) years of continuous service. Russo requested that the issues raised in his letter be submitted to the General Pension Board for "final determination pursuant to Section 8.1 of the Bethlehem Pension Plan." *Id.* at 79-80. Plaintiff was then informed by the EBAC on June 16, 1997 that he had previously exhausted all available appeals steps under the Bethlehem Pension Plan with respect to some of his claims. *Id.* at 83-85. Additionally, there was no new information presented for reconsideration of the earlier decided issues. *Id.*[8]

On July 2, 1997, Mr. Russo requested that the EBAC conduct a "plenary review of all matters." *Id.* at 87-88. On August 6, 1997, Plaintiff was informed by the EBAC that he "may submit to the Committee for review any additional evidence that he believes is relevant to his appeal." (Pl's

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[7] The first Notice of Eligibility for Deferred Vested Pension stated that Plaintiff's continuous service broke after a two year period of layoff. The Revised Notice of Eligibility for Deferred Vested Pension correctly stated that Plaintiff's service broke after a two-year period of disability and that Plaintiff's eligibility for a Deferred Vested Pension arose under the terms of the 1985 Plan, as opposed to the 1994 Plan. (Notice of Eligibility for Deferred Vested Pension, Ex. 32-33). In conjunction with the Notice, Plaintiff received a letter that there had been a clerical oversight regarding his service break and that was the reason Plaintiff did not receive a Notice from the EBAC for his service break. Upon discovering this error, Defendants prepared a Notice and sent it to Plaintiff. (Notice of Eligibility for Deferred Vested Pension, Ex. 33).

[8] The June 16th letter also contained a statement that Plaintiff's absence after January 27, 1986 was not due to a "compensable disability incurred in the course of employment under Paragraph 5.1(b)(4) of the 1985 Plan." (Letter from E.R. French to R. Harte of 6/16/97).

Admission, No. 58 at pp. 75-76). Plaintiff did not submit any additional information. Lastly, on October 14, 1997, the Secretary informed Plaintiff's attorney that, after a complete review of Plaintiff's case, the EBAC concluded that there was no basis to change the determination that the "compensable disability" provisions of the 1985 Plan did not apply to Plaintiff. *Id.* at 92-93.

Plaintiff instituted this action on October 21, 1997. Plaintiff alleges that Defendants violated ERISA, *as amended*, 29 U.S.C. § 1001 *et seq*. Before the court is Defendants' motion for summary judgment.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under governing substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In addition, a dispute about material facts must be "genuine" such that a reasonable jury could return a verdict for the nonmoving party. *Id.* The moving party has the initial burden of producing evidence purporting to establish the absence of a genuine issue of material fact; however, if the nonmoving party fails to produce sufficient evidence with respect to an essential element of its claim and for which it will bear the burden of proof at trial, then the moving party is entitled to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party meets its burden, the nonmoving party must come forward with specific facts contradicting those set forth by the moving party, thereby showing that there is a genuine issue for trial. *See Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Although the court considers the nonmovant's evidence as true and draws all reasonable inferences in the nonmovant's favor, *see Anderson*, 477 U.S. at 255, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

Plaintiff has been unable to show that any genuine issue of material fact exists and therefore the court will grant Defendants motion for summary judgment.

II. Legal Standard

In a civil action for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B), where the plaintiff challenges a discretionary eligibility determination under the plan, the reviewing court shall uphold the eligibility determination unless the determination is arbitrary and capricious. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 114-15 (1989) (holding that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard *unless* the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan) (emphasis added);[9] *see also McChesney v. Bethlehem Steel Corp.*, 1994 WL 114773, at *13 (E.D. Pa. Mar. 29, 1994) (this court held that defendants' conduct was not arbitrary and capricious at any relevant time and the plan administrator's final determination will be upheld). Here, the Plan's regulations provide that the Plan Administrator or General Pension Board shall "conclusively determine" the

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[9] 1985 Plan § 8.1—gives the Plan Administrator the power "to make and enforce such rules and regulations . . . as the Plan Administrator shall deem necessary or proper for the efficient administration of this Plan, and to decide such questions as may arise in connection with the operation of this Plan."

length of continuous service under the Plan. Therefore, the arbitrary and capricious standard applies to the determinations in this case. *See McChesney*, 1994 WL 114773, at *14 (citing *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993). [10]

The court is not free to substitute its own judgment for that of the defendants. *See McChesney*, 1994 WL 114773, at *14. The court may overturn a decision of the Plan Administrator only if it is "without reason, unsupported by the evidence or erroneous as a matter of law." *Abnathya* 2 F.3d at 45 (citing *Adamo v. Anchor Hocking Corp.*, 720 F. Supp. 491, 500 (W.D. Pa. 1989). As the court discusses below, Plaintiffs' arguments that the Plan Administrator's decision is contrary to the evidence and erroneous as a matter of law must fail.

A. Plaintiff is Not Entitled to an Enhanced Pension Plan.

Plaintiff believes that he is entitled to a better pension plan than the one afforded to him by Defendants. Additionally, Plaintiff alleges that the denial of additional pension benefits was made arbitrarily and capriciously. The court determines that the EBAC's interpretation of the 1985 Plan's terms, to which Plaintiff is entitled, is correct. The 1985 Plan clearly gives the Plan Administrator the discretion to interpret and apply the Plan's terms. Plaintiff has produced no evidence which would necessitate a contrary finding.

B. Plaintiff is Not Entitled to Workers' Compensation Benefits.

Plaintiff argues that he is entitled to workers' compensation benefits. However, workers' compensation benefits are

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[10] The *Abnathya* court held that the plain language giving the administrator "the power to construe to the Plan . . . and to determine all questions relating to eligibility" triggers the arbitrary and capricious standard.

available only for a "compensable disability incurred during the course of employment." Although Plaintiff contends his situation fits within this definition, the Plan Administrator has interpreted "compensable disability" to mean disabilities caused by an employee's work for Bethlehem Steel and subject to workers' compensation remedies. The only on-the-job disability that Plaintiff has referred to is "stress." Plaintiff has not, however, submitted any information to the Plan Administrator showing that his inability to handle stress was caused by his employment. Moreover, Plaintiff has not filed for workers' compensation benefits. Therefore, the court declines to further address this issue.

C. The Plan Sponsor is Not Required to Treat Workers' Compensation and Social Security Disability Benefits Equally.

Plaintiff next argues that, according to *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), a plan sponsor must treat workers' compensation and Social Security disability benefits equally. However, this interpretation of *Alessi* is inaccurate. The *Alessi* court held that ERISA does not forbid reductions of pension benefits based on awards under state workers' compensation laws. *See id.* at 509. In other words, a Plan sponsor *may* elect to reduce a participant's pension benefits in the amount of his workers' compensation or in the amount of his disability payments under the Social Security Act. *See id.* (emphasis added). This rule is permissive. The plan sponsor, as indicated by Section 5.1(b)(4), chose to extend continuous service time to participants who have been injured in the course of their employment while they are receiving workers' compensation benefits. Because the plan sponsor was not required to treat workers' compensation beneficiaries and social security beneficiaries the same, it cannot be said that he acted improperly with regard to Plaintiff.

D. The Reimbursement Act Does Not Apply to Plaintiff's Case.

Next, Plaintiff asserts that the Reimbursement Agreement for long-term disability benefits requires reimbursement of workers' compensation benefits, Social Security disability benefits, and other benefits received from another benefit plan. The Reimbursement Agreement, however, applies to long-term disability benefits paid to the Social Insurance Plan of Bethlehem Steel Corporation and Subsidiary Companies, a welfare benefit plan under ERISA which is separate from the 1985 Plan at issue. Therefore, the court declines to further address this issue.

E. Defendant Did Not "Willfully Discriminate" Against Plaintiff.

Plaintiff also contends that Defendant "willfully discriminated" against him when it denied his requests to include his pre-1967 employment in his continuous service and to extend his continuous service past January 27, 1988. Plaintiff believes that such discrimination amounted to a violation of Section 510 of ERISA.[11] However, in order to prevail in a Section 510 claim, a plaintiff must prove by a fair preponderance of the evidence that the defendants engaged in prohibited conduct with the specific intent to interfere with the plaintiff's pension benefits. *See McChesney*, 1994 WL 114773, at *9 (citing *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987)); *see also Pace v. Eureka, Inc.*, 1998 WL 162877, at *3-4 (E.D. Pa. Apr. 8, 1998) (summary

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[11] Section 510 of ERISA provides: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140.

judgment granted because plaintiff failed to raise a genuine issue of material fact concerning an element of his prima facie case under §510 of ERISA). Although a plaintiff need not prove that "the sole reason for his [or her] termination was to interfere with [employee benefits]," he must nonetheless demonstrate that the defendant had the "specific intent" to violate ERISA. *Gavalik*, 812 F.2d at 851. Here, Plaintiff has failed to prove that Defendants acted "willfully" or with "specific intent" to deprive Plaintiff of any additional benefits. It is undisputed that Plaintiff received, and will continue to receive, benefits from Defendant, but Plaintiff is entitled to nothing more. There is no evidence that Defendant acted arbitrarily or capriciously. Accordingly, Plaintiff's claim that Defendants abused their discretion and violated Section 510 is dismissed and summary judgment on these claims is granted to Defendant.

F. Plaintiff Did Not Satisfy the Fifteen (15) Year Service Requirement.

Plaintiff claims that he is entitled to benefits based on fifteen (15) years of continuous service at Bethlehem Steel. Plaintiff worked for Bethlehem Steel from February 15, 1973 until January 27, 1986. Defendants then gave Plaintiff two more years of service, which extended his time of service until January 27, 1988. Despite these additional two years, Plaintiff fell short of the required 15 years. Plaintiff argues that because he was receiving a disability allowance until May 6, 1986, and vacation pay until May 20, 1986, he was an active employee of Bethlehem Steel throughout this time period. Plaintiff's time of service would thereby exceed the required fifteen (15) years. Unfortunately, however, Plaintiff's argument has no merit.

The "Elapsed Time" regulations provide that an employer may calculate an employee's continuous service by taking "the total period of time which elapses while the employee is

employed." *See* 26 C.F.R. §§ 1.410(a)-7(a)(1)(ii). An employee is entitled to have his or her service taken into account from the date he or she begins to participate in the plan until the severance from service date. *See* 26 C.F.R. §§ 1.410(a)-7(a)(2)(iv). Under those regulations, "[t]he date the employee severs from service is the earlier of the date the employee quits, is discharged, retires or dies, or the first anniversary of the date the employee is absent from service for any other reason."[12] 26 C.F.R. §§ 1.410(a)-7(a)(2)(ii). Plaintiff's service was terminated effective January 27, 1988. In fact, because Defendant was not required to give two years of added service to Plaintiff, Defendant could have severed Plaintiff's continuous time on January 27, 1987. The additional year afforded to Plaintiff by Defendant was gratuitous, not required.

The court believes that the EBAC's interpretation of these regulations was fair and consistent with the 1985 Plan. Hence, the court rejects Plaintiff's argument that he accrued over fifteen years of continuous service.

F. Defendant Did Not Breach a Fiduciary Duty to Plaintiff.

Although employers are not subject to ERISA's fiduciary duties, plan administrators under ERISA are required to, *inter alia*, "discharge [their] duties 'solely in the interests of the participants and beneficiaries.'" 29 U.S.C. § 1104(a)(1); *see also Gramm v. Bell Atlantic*, 983 F. Supp. 585, 593 (D. N.J. 1997) (quoting *Fischer v. Philadelphia Elec. Co.*, 1994 WL 194836 (E.D. Pa. May 13, 1994)). A mistake in calculating pension benefits does not constitute willful misconduct or bad faith sufficient to support a breach of fiduciary duty. *See*

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[12] Other reasons would include disability, vacation, leave of absence, and layoffs.

Burke v. Latrobe Steel Co., 775 F.2d 88, 91 (3d Cir. 1985).[13] Plaintiff "ha[s] neither alleged nor produced any evidence of bad faith by [Defendant] . . . . Plaintiffs here are attempting to take advantage of [Defendant's] mistake which, upon discovery, was quickly corrected." *Bernatowicz v. Colgate-Palmolive Co.*, 785 F. Supp. 488, 494 (D. N.J. 1992), *aff'd*, 981 F.2d 1246 (3d Cir. 1992).

In the case at bar, Defendant informed Plaintiff that the Plan Administrator usually tries to ensure that plan participants receive a Notice within a reasonable time after their service breaks or of any other problems that may have an effect on an employee's benefits. Indeed, "once an ERISA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status and situation, the fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstances. *Bixler v. Cent. Pa. Teamsters Health Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993). Unfortunately, Plaintiff received no notice due to a clerical oversight. Upon discovering this, Defendant immediately prepared a Notice and sent it to Plaintiff. The record is clear that Defendant at all times acted in good faith.

Despite this mistake, Plaintiff alleges that Defendants breached their fiduciary duty by not informing him that he was entitled to the Deferred Vested Plan contained in the 1985 Plan. However, notice by the Plan Administrator to Plaintiff is not a requirement and Defendant did not owe Plaintiff any fiduciary duty in that regard. The Plan

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[13] *Burke* stated that trustees do not breach their fiduciary duties by interpreting the benefits plan incorrectly, so long as their interpretation was done in the good faith belief that it was correct. *Burke* 775 F.2d at 91.

Administrator had no obligation to inform Plaintiff that his service had been broken.

H. Defendants Lack of Notice to Plaintiff Does Not Qualify For an Omission of a Material Fact.

Plaintiff contends that the lack of notice on the part of Defendants was a material fact. He maintains that the Pennsylvania Supreme Court has held that willful non-disclosure of a material fact constitutes fraud. *See Gibbs v. Ernst*, 538 Pa. 193 (1994); *see also Bixler*, 12 F.3d at 1300 (3d Cir. 1993) (holding that "fiduciaries owe a duty to inform which entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful and the duty to disclose material information 'is the core of a fiduciary's responsibility'"). Plaintiff's argument fails, however, because there were no misrepresentations on the part of Defendants. They did not mislead, misinform or willfully conceal any information that was available to Plaintiff. The administration's failure to notify Plaintiff of his service break does not amount to material misrepresentation. In fact, notifying Plaintiff of his Deferred Vested Pension in 1988 would have had no bearing on the type on benefits Plaintiff was going to receive. In addition, and to restate an earlier point, the Plan Administrator is not required to notify each participant of his rights to his pension. In short, Plaintiff did not lose any benefit that could have been attained by him had the Defendants given him notice, (i.e. Plaintiff has not lost any "vested benefit").

I. Defendant Did Not Violate the Consolidated Omnibus Budget Reconciliation Act of 1985.

Plaintiff also states that he never received notice that his medical benefits were being terminated, and that this failure to provide notice was a violation of the Consolidated

Omnibus Budget Reconciliation Act of 1985 ("COBRA"). However, the COBRA plan does not relate to the Bethlehem Pension Plan and Plaintiff cites no authority to support such a claim. Therefore, the court declines to address this issue.

J. Plaintiff is Not Entitled to Bridging of Service.

Plaintiff argues that he is entitled to a "bridge of service."[14] Moreover, Plaintiff claims that he relied on a statement made to him by a Bethlehem Steel official that if he returned to work in the future, his previous years of service would be included. However, the record contains no evidence to support this claim, and Plaintiff is otherwise unable to substantiate it.

Even if the above argument had merit, Plaintiff's claim that he is entitled to a "bridge of service" is barred by the statute of limitations.[15] Section 1113 of ERISA requires that, in order for Plaintiff's claim against Defendant to be barred prior to the expiration of the section's six-year limitations period, Plaintiff must have had "actual knowledge." *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1176 (3d Cir. 1992). "Actual knowledge of a breach or violation requires that a plaintiff

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[14] Plaintiff asks the court to extend his service at Bethlehem Steel from July 9, 1962 through December 8, 1967.

[15] Section 1113 of ERISA provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, . . . or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

have actual knowledge of all material facts necessary to understand that some claim exists, which facts could include . . . knowledge of a transaction's harmful consequences . . . ." *Id.* at 1177; *see also Connell v. Trustees of Pension Fund of Ironworkers Dist. Council of N. N.J.*, 118 F.3d 154, 158 (3d Cir. 1997).[16] In the case at bar, Plaintiff knew that his pre-1967 service would not be added to his pension. Specifically, Plaintiff sent, and the Plan Administrator received, a memorandum requesting that his pre-1967 service be included for purposes of his pension. In April 1982, Plaintiff was informed of this denial.[17] Hence, Plaintiff was aware of his claim long before the lawsuit was filed. Therefore, because Plaintiff had actual knowledge that his claim was rejected, his claim is barred by the statute of limitations [18]

The 1985 Plan specifically states that the "rule of parity" only applies to breaks in service occurring on or after January 1, 1976. The rule does not apply to Plaintiff's pre-1973 service break. This court previously held that the 1985 Plan's reference to practices in effect at the time the break occurred "incorporates more than just the 1923 Bethlehem Pension Plan; it also incorporates the written policy statements in effect at the time." *McChesney*, 1994 WL 114773, at *7. Therefore, the five years of service Plaintiff incurred will be excluded.

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[16] *Gluck* states that knowledge constituted "knowledge of all relevant facts at least sufficient to give plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated. *Gluck*, 960 F.2d at 1178.

[17] Plaintiff made the same request again in 1984. Since there was no new evidence to support Plaintiff's claim, no basis for reevaluation existed.

[18] Plaintiff unsuccessfully raised this claim in 1982, and he is now equally unsuccessful.

Accordingly, Plaintiff's claim for the bridging of service is dismissed and summary judgment on this claim is granted to the Defendant.

Conclusion

For the reasons stated above, Defendants' motion for summary judgment is granted.